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will be found useful.
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is a copy of a letter
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Chapter I

Bicultural and Federal Issues in the Supreme Court's History

It is not intended in this historical section to present, even in outline, a complete history of the Supreme Court of Canada. Parts of that history have been described in considerable detail before and other parts are not immediately relevant to this inquiry into the bilingual and bicultural aspects of the Court. The purpose of this brief historical account is to provide an historical perspective for the analysis of the Court's current relationship to bicultural and federal issues. With this purpose in mind our main interest in this historical section is to trace the relationship of the Court, at each stage of its development, to bicultural or federal concerns. In particular we are interested in seeing the extent to which the differences between the Court's supporters and its opponents have been a source of tension between French and English-speaking Canadians. In short, this is a political history of the Supreme Court of Canada with the focus on the Court's impact on bicultural and federal issues.

1. Origin

(i) At Confederation

The Supreme Court was not one of those institutions which was either carefully planned or the object of difficult

negotiations at the time of Confederation. The proposal to give the federal legislature the power to establish a General Court of Appeal in Canada does not appear to have excited much interest or controversy during the conferences and debates which led up to Confederation. The only section of the new Constitution, Section 101, which dealt with what was to become the Supreme Court was particularly brief. It merely permitted the Canadian Parliament at some future date to provide a General Court of Appeal for Canada, making no mention of the personnel of such a Court, their method of appointment or the particulars of the Court's jurisdiction. The same section also stated, rather elliptically, that Parliament could establish "any additional Courts for the better administration of the laws of Canada".¹

The explanation of this relatively uncontroversial and cursory treatment of the General Court of Appeal must at least in part be based simply on the fact that the judicial organization of the new State, compared to its executive and legislative institutions, was not regarded as fraught with significant political implications. Certainly those involved in the Confederation movement did not envisage their efforts

¹The British North America Act, 1867, Section 101. Note that in the Quebec Resolutions, the General Parliament's power to establish a "General Court of Appeal for the Federated Provinces" and its power to establish "additional Courts . . . in order to the due execution of the laws of Parliament" are provided for in two separate clauses, 29 (34) and 31 respectively.

producing any fundamental change in the administration of justice in British North America. Although the B.N.A. Act, in addition to granting Parliament the power to establish federal courts, also gave the provinces the power to organize provincial courts of both civil and criminal jurisdiction, the exercise of these powers was not expected to result in the immediate establishment of a new set of Canadian courts. The basic judicial institutions of the new country were simply to be carried over from the pre-Confederation period, and this was provided for in Section 129 of the B.N.A. Act.

Similarly with appeals from provincial courts, there would be no immediate need for the general legislature to exercise the powers bestowed on it by Section 101, for already there existed a well-established right of appeal from the British North American colonies to the Judicial Committee of the Privy Council and this system of Privy Council appeals from the provincial courts would unquestionably be continued in the new Canada¹. Indeed the fact that the colonists, both French and English, who worked out the Confederation arrangements had for several decades lived under the final appellate jurisdiction of the English Privy Council must have

¹ For details concerning the Pricy Council's jurisdiction before and after Confederation see Norman Bentwich, Privy Council Practice. (London: Sweet & Maxwell, Ltd., 1937.)

muted both the controversy and interest which the proposal for a federal appeal court might otherwise have aroused.

But while the provision for a general Canadian appeal court was far from being a central issue at the time of Confederation, it did seem important enough to be included as at least one of the possible institutions of the new country and it did excite some opposition. What were the main intentions of its original proponents and what were the chief complaints of its earliest opponents?

In reviewing the possible reasons for proposing a General Court of Appeal in Canada one is immediately struck by the tendency for each reason to suggest a possible objection to such a Court. As Sir John A. Macdonald candidly admitted when referring to the proposed court in his opening speech in the Confederation Debates of 1865, "There are many arguments for and against the establishment of such a court."¹ And it was no doubt this rather close balance of pro's and con's which largely accounts for the eight year delay in establishing the Supreme Court following Confederation.

Take even the most convenient if not the most convincing reason for including among the central legislature's powers the power to establish a General Court of Appeal: the fact

¹ Parliamentary Debates on the Subject of the Confederation of the British North American Provinces. 3rd Session, 8th Provincial Parliament of Canada, 1865, p. 41.

that in keeping with Lord Durham's Report the Canadian Legislature established in 1841 had been given such a power.¹ This, indeed, was the only reason put forward by Sir John A. Macdonald in his speech in the Canadian Assembly. But as Macdonald himself acknowledged the Canadian Legislature had never seen fit to exercise this power — a fact which might suggest either that the establishment of a General Appeal Court had not been an urgent necessity or that it was politically objectionable.

When we turn to the more tangible reason for establishing a Canadian Supreme Court the most mundane argument which we encounter is that which cited the saving in time and money which Canadian litigants would realize in not having to take their appeals to London. Many of the Court's supporters were inclined to push this consideration to the forefront of their arguments simply on the grounds that since the specific judicial functions which a Canadian Supreme Court might provide could be, and indeed in the absence of a Canadian Supreme Court, would be provided by the Judicial Committee of the Privy

¹The Union Act of 1840 (3-4 Vic. c.35) in Section 47 carried over the Courts of Civil and Criminal Jurisdiction of Upper and Lower Canada into the new Province of Canada, but subject to an overriding power vested in the Legislature of the Province of Canada to make new provisions for the judicial institutions of the new colony. Macdonald presumably believed that this clause implied a power to establish a general appeal court.

Council, the case for the Canadian Court must rest on the great convenience ~~of~~ having these judicial services provided in Canada rather than England. However, the argument that a Canadian Appeal Court would save appellants from provincial courts the long and expensive trip to London could not be pushed very far without raising the question of the continuation of Privy Council appeals. If the right to appeal to "the foot of the throne" from Canadian courts was not to be abolished, then the argument for the Supreme Court based on convenience could hardly be sustained. In fact, just the opposite -- the opponents of the Court, could argue that it would only be an intermediate appellate Court and, as such, simply another expensive step on the litigant's road to London.¹

Here the Court's advocates found themselves in an ambivalent position, for, while they wanted to stress the economies which a Canadian Court of Appeal might afford Canadian litigants, they were completely unwilling to contemplate the abolition of Privy Council ~~appeals~~. This ambivalence is well illustrated by Alexander Galt's explanation of the General Appeal Court's role in the Confederation scheme. After first stressing that as far as appeals ~~to~~ the Privy

¹

See, for example, speech of Henri E. Taschereau. Parliamentary Debates on the Subject of the Confederation of the British North American Provinces. 3rd session 8th Provincial Parliament of Canada, 1865, p. 896.

Council were concerned "it was not intended to deprive the subject of recourse to this ultimate court" he went on in the same passage to defend the plan for a Canadian Appeal Court in these terms;

. . . but at the same time, it was well, in assimilating the present systems of law, for the benefit of all the Provinces that they should have the assembled wisdom of the Bench brought together in a general court of appeal to decide ultimate causes, which would before long doubtless supersede the necessity of going to the enormous expense of carrying appeals to England.¹

Following Confederation Sir John A. Macdonald's ministry never wavered in its determination to keep a Canadian General Court of Appeal at the level of an intermediate appeal court, with a final appeal to the Privy Council.² It was not until Alexander McKenzie's Liberal Government took over the sponsorship of the Supreme Court in 1875 that the nationalist aspiration of abolishing appeals to the Privy Council and making the Canadian Supreme Court a final appellate court came to the fore. Even then, the plan to prevent appeals from

¹ Speech on The Proposed Union of the British North American Provinces. Delivered at Sherbrooke, Nov. 23, 1864. (reprinted in the Montreal Gazette) p. 67.

² In Sir John A. Macdonald's second Supreme Court Bill there was a provision to limit "statutory" appeals from the Supreme Court to the Judicial Committee of the Privy Council to cases involving £500 or more in which the Supreme Court granted leave. This was not, however, intended to affect what were thought of as "prerogative" appeals. Bill No. 48, sections 40 & 43. 1870 Session of Parliament of Canada.

the Supreme Court to the Privy Council would have left intact the appeal from provincial courts to the Privy Council. So, at most, the Supreme Court would only provide an alternative final court of appeal for Canadian litigants.

Not only was the Supreme Court originally planned as an intermediate appeal court, but for at least the two provinces of Quebec and Ontario it would be an additional intermediate appeal court -- a fact which was not apt to impress lawyers and jurists from those two provinces with the increased economies and convenience which might be afforded by such a court. Certainly one of the constant objections to the Supreme Court all through the period of its establishment, and for some time after, was the complaint that in Ontario and Quebec where provincial appeal courts already existed, it would create yet another opportunity for appeal and consequently favour the more affluent litigant who might threaten to drag his poorer adversary through three or four appeal courts before accepting settlement in a case.

The proposed Supreme Court was especially vulnerable to this line of attack from Quebecers. In Quebec there was already an appeal from the court of first instance, the Superior Court, to the Court of Review, and after this there was provision for an appeal to the Court of Queen's Bench. It was only for the maritime provinces where no courts of appeal had been established that there seemed to be a particularly strong case for providing a new Canadian appeal court.

But when the argument based on convenience and economy broke down, as it was apt to, proponents of the new Court had to adopt a larger rationale in which the Supreme Court was envisaged as an essential working organ in the governmental system of the new federal state. Here enforcement of federal laws, the adjudication of federal disputes and the interpretation and application of the Constitution could be cited as functions which called for the organization of a federal judicial establishment in Canada. Sir John A. Macdonald later gave the following explanation of the evolution of his Supreme Court plans:

When the Supreme Court system was adopted as a portion of the constitution of British America, it was not adopted without grave consideration by those who were concerned in the original resolution and in the adoption of the scheme which culminated in the British North America Act. It was considered that, following the example of the United States, there should be one Supreme Court of Appeal, to which all cases, arising at all events, out of the laws of the Federal Parliament, might go for adjudication. It was afterwards pressed, and successfully pressed, that, as with the exception of Ontario and Quebec, there were no courts of appeal in the Provinces, the court should not only be a court of appeal on dominion and constitutional questions relating to the laws passed by the Federal Parliament, but a supreme court of appeal, intermediate between the courts of original jurisdiction and the final court of appeal, the Judicial Committee of the Privy Council.¹

Clearly, if Macdonald's memory was accurate, the Court's earliest advocates gave paramount importance to the Court's adjudication of federal and constitutional issues rather than

¹ Canada, House of Commons Debates, 1885, 163.

its appellate jurisdiction over provincial law matters.

At the time of Confederation, and for a short time thereafter, there were certainly some who thought of Section 101 of the B.N.A. Act as leading logically to the development of a separate tier of federal courts specializing in federal legal matters, rather analogous to the American system. It will be recalled that in the Quebec Resolutions the federal legislature's power to establish a General Appeal Court and its power to establish additional courts for the enforcement of federal laws had been put forward as two separate powers.¹ While these powers had been brought together in the same section of the B.N.A. Act they still suggested the possibility of linking to the Supreme Court's appellate responsibilities an extensive, and possibly exclusive, original jurisdiction over matters of federal import.

Further evidence of such intentions is amply provided by Sir John A. Macdonald's first Bill to establish a Supreme Court, drawn up in 1869.² This Bill vested in the Supreme Court exclusive original jurisdiction in a large number of matters, including all cases challenging the constitutionality of provincial or federal laws, cases involving the enforcement of dominion revenue laws, cases involving the Crown (provincial or dominion!) as a party, cases involving foreign governments or their representatives, cases concerning federal legislation

¹ See above, page 2, footnote 1.

² Bill No. 80. Public Archives of Canada. Macdonald Papers, vol. 159.

implementing treaties and cases assigned to the Court by federal statutes.¹ In addition it gave the Supreme Court a concurrent original jurisdiction with the provincial courts in cases involving citizens of different provinces or foreign states.² It was this part of Sir John's proposal that aroused the most severe criticism and which eventually fell before a storm of provincial protest.

But short of these rather grandiose plans for a Supreme Court with an exclusive jurisdiction over important federal issues, most of the Court's sponsors expected a Canadian Supreme Court to play a major role in settling constitutional disputes and in creating greater uniformity in Canadian law. First, as for the task of determining the constitutional validity of federal and provincial Acts there was some awareness of the crucial importance of the judiciary in general and of a federal supreme court in particular in this phase of federal government. We know that at the Quebec Conference several of the delegates in discussing the division of legislative powers proposed that a "Supreme Court of Appeal...decide any conflict between general and state rights".³ Although there

¹ Same, section 53.

² Same, section 56.

³ Mr. R.B. Dickey. Quoted in A.G. Doughty (ed.) "Notes on the Quebec Conference" in Canadian Historical Review (1920) p. 43. See also speech by Mr. George Brown, p. 43.

were others who, fearing the political power which would accrue to the courts under such a system of judicial review, argued that the incorporation of this system in the Canadian constitution would "land us in [the] position of [the] United States by referring matters of conflict of jurisdiction to courts. You thus set them over the General Legislature."¹

Considering how powerful the United States Supreme Court through its exercise of judicial review had by this time become in the American federal system, it is surprising that there was not more consideration by Canadians of the implications of judicial review and of the requisite qualities of the tribunal which would carry out this responsibility. Of course, one reason for the rather scanty consideration of this issue was simply that regardless of what judicial instruments were designed for performing this task of judicial review in Canada, the Privy Council would continue to exercise a final control over the constitutionality of Canadian laws. Indeed, in this sense, judicial enforcement of the federal provisions of the B.N.A. Act could be viewed as a logical extension of imperial supervision of colonial legislation. As Sir John A. Macdonald observed at the Quebec Conference in replying to McCully's general criticism of judicial review, "Our Courts now can decide where there is any

¹Mr. Jonathan McCully. Same, p. 44.

conflict between the Imperial and Canadian Statutes."¹ And, he might have added, the Canadian Constitution would take the form of an Imperial Statute.

But there was still a special function for a Canadian Supreme Court to serve in judging disputes involving the clash of dominion and provincial powers. This was to provide a body of senior Canadian jurists who could guide the Canadian Government in arriving at its own decisions as to the constitutionality of the federal parliament's Acts or those of the provinces. The first few years following Confederation soon demonstrated that the division of legislative powers set down in the B.N.A. Act was far from unambiguous. Given the growing number of conflicts between federal and provincial legislation to which these ambiguities gave rise, the need was soon felt for a convenient and ready source of respectable juristic advice which could be given without waiting for doubtful laws to be challenged in the normal course of litigation. This advice, while lacking the formal status of a judicial decision,² could either be used directly by the

¹ Same, p. 44.

² The idea of having a judicial tribunal give the executive branch of government advisory opinions was, of course, partially based on the model of the Judicial Committee of the Privy Council which, in theory, did nothing more than render advice to the Queen. See, for example, Sir John A. Macdonald's explanation of advisory opinions in Dominion Parliamentary Debates, 1870, 525.

federal government in deciding whether to disallow provincial Acts or indirectly as a guide for its own law-making and its negotiations with the provinces. Thus we find in the first Supreme Court Bill, drafted in 1869¹ and in every subsequent Supreme Court Act up to the present day,² the unique Canadian provision for advisory Supreme Court opinions on questions -- particularly constitutional questions -- submitted to it by the Canadian Government. It should be emphasized that at this stage Macdonald intended this quasi-judicial power to be used as an instrument of federal supervision of provisional legislation: neither the 1869 nor the 1870 Bills referred to the Supreme Court's determining the constitutional validity of Acts of the federal parliament.

Finally, the achievement of greater uniformity and coherence in the laws of Canada was, if not the clearest, at least the most contentious of the goals proposed for the General Appeal Court. As far as federal laws were concerned there was no question of the General Appeal Court's right and duty to ensure their uniform enforcement and interpretation

¹ Bill No. 80, 1869. Sections 50 and 51.

² Supreme Court Act, R.S.C. 1952 c. 259 (as amended by R.S.C. 1952, c. 335, 1956 c. 40 Section 55).

either through the original jurisdiction of federal courts or a national court's appellate jurisdiction over provincial courts. Both Galt¹ and Cartier² in their explanations of the General Appeal Court's functions emphasized this role especially with relation to federal criminal law and commercial law. But there was a tendency to look for a broader process of legal assimilation which would touch the general jurisprudence of the country including many of those matters subject to provincial legislative power under the B.N.A. Act. There was certainly constitutional support for this projected function of the Supreme Court as far as the common law provinces were concerned, for both the Quebec Resolutions³ and Section 94 of the B.N.A. Act looked forward to the Provinces of Nova Scotia, New Brunswick and Ontario granting the federal legislature the power to establish uniform laws in relation to property and civil rights. However, even without the implementation of this uniformity clause, if appeal was to lie from provincial courts to the General Appeal Court in

¹ See Galt's Speech Delivered at Sherbrooke, Nov. 23, 1964. (above p. 7, footnote 1). p. 67.

² For Sir Georges-Etienne Cartier's views on the General Court of Appeal, see his speech in Parliamentary Debates on the Subject of the Confederation of the British North American Provinces, 1865, 576-7.

³ Quebec Resolution No. 29(33).

provincial law matters this in itself would give the General Appeal Court a real opportunity to introduce a measure of uniformity into the provincial legal systems.

It was this possibility of the new federal court's appellate jurisdiction extending to provincial law matters which touched off the strongest reaction against the court during the Confederation debates. This reaction was at this time voiced exclusively by representatives of Lower Canada. Their basic contention was, of course, that decisions dealing with Quebec's Civil Code rendered by provincial Judges who had trained and practiced in that legal system ought not to be reviewed by a Court of Appeal staffed by judges of whom only a minority would be versed in Quebec's civil law. The result of this system, to quote Joseph Cauchon, the most vehement spokesman of this position, "would be that those same laws would be explained by men who would not understand them and who would, involuntarily perhaps, graft English jurisprudence upon a French Code of Laws."¹ It should be noted that not all of French-Canada's spokesmen shared these anxieties. Indeed when Cauchon demanded that the sponsors of the Confederation proposals state whether the Court of Appeal would be a civil, as well as a constitutional tribunal, with jurisdiction over Quebec, Sir Georges-Etienne

¹ Parliamentary Debates on the Subject of the Confederation of the British North American Provinces, 1865, 375.

Cartier on behalf of the ministry gave a decidedly affirmative answer. After referring to the Court's role in administering federal laws he went on to speak in these optimistic terms of the Court's treatment of provincial law:

...If it is created it will be fit that its jurisprudence should extend to civil causes which might arise in the several Confederate Provinces, because it will necessarily be composed of the most eminent judges in the different provinces, of the jurists whose reputation stands highest, of men, in short, profoundly skilled in the jurisprudence of the provinces which they will respectively represent.¹

But other Quebec delegates clearly did not share this high assessment of the future Appeal Court's qualifications for dealing with their province's civil law, especially the recently codified private law system of Lower Canada. Following Cauchon, both Antoine Dorion² and Henri Taschereau³ expressed their hostility to the idea of a Court composed predominantly of jurists from the English common-law tradition being vested with an appellate control over the French civil law of Lower Canada.

It must be emphatically stated that this point of view expressed by Cauchon, Dorion and Taschereau in the Confederation Debates has remained to this day the classical objection of Quebec lawyers and jurists to the Supreme Court's appellate jurisdiction. It is the one consistent note of French Canadian complaint that recurs throughout the nearly

¹ Same, 576.

² Same, 690.

³ Same, 896-7.

century of debate over the Canadian Supreme Court. While we must return to this theme at many stages in this study, there are three points in connection with it that should be noted here.

First, the antipathy to having the Civil Code of Lower Canada interpreted by judges from an alien legal tradition was not based merely on a concern for legal purity or accuracy. It stemmed more often from the more fundamental premise that Quebec's civil-law system was an essential ingredient of its distinctive culture and therefore it required, as a matter of right, judicial custodians imbued with the methods of jurisprudence and social values integral to that culture. There was some tendency at Confederation as there is now to argue that the distinctiveness of Quebec's private law could only be preserved by a dualistic judicial structure. Hector Longevin, the Solicitor-General for Canada East, put it this way in the Confederation Debates of 1865:

Again we have at the present time as many systems of judicature as we have provinces; with Confederation, on the contrary, this defect will be removed, and there will be but two systems: one for Lower Canada, because our laws are different from those of other provinces, because we are a separate people, and because we do not choose to have the laws of the other populations...All the other provinces having the same laws, or their system of law being derived from one and the same source, may have one and the same system of judicature, and, in fact, a resolution of the Conference allows them to resolve that they will have one code and one judicial system.¹

¹Parliamentary Debates on the Subject of the Confederation of the British North American Provinces, 1865, 365-6.

As the final point in Longevin's speech suggests this policy of judicial dualism received some further Constitutional support from Section 94 of the B.N.A. Act which omits Quebec from the uniformity both of laws and court procedure contemplated for the common law provinces of Canada.

Secondly, the fact that Quebec Courts were already subordinate to the Privy Council took some of the sting out of the criticism of the Supreme Court's appellate jurisdiction. It was certainly in itself no innovation to subject the decisions of Lower Canadian judges on the French civil code to review by English common-law judges. But the attitude of Lower Canadian critics of the Supreme Court to the Privy Council was interesting. Some only accepted the Privy Council appeal as an undesirable but unavoidable consequence of British Imperial policy and looked forward to its eventual abolition.¹ But the more prevalent tendency was to compare the proposed Supreme Court unfavourably with the Privy Council and to look with considerable awe upon the cosmopolitan judicial talents represented on the latter tribunal. Members of the Judicial Committee, because of their classical legal education in the principles of Roman Law, the affinity of their own law of equity to precepts of

¹This, for instance, seems to have been the attitude of Joseph Cauchon. Same, 575-6.

the French civil law, their alleged linguistic versatility and the fact that they were continually being called upon to hear appeals from the many diverse legal systems of the British colonies, were looked upon as being more capable of doing justice to Quebec's laws than the collection of Canadian jurists who might man the Supreme Court. The opinion of Henri Taschereau that "Lower Canadians will assuredly be less satisfied with the decisions of a Federal Court of Appeals than with those of Her Majesty's Privy Council",¹ was shared by many others from his province all through these early years of debate over the Supreme Court. It was only well after the establishment of the Supreme Court that Quebec jurists began to examine critically the effect of Privy Council decisions on their system of law.

Thirdly the Lower Canadian opposition to appeals in matters of civil law from their provincial courts to a General Canadian appeal court touched the basic issue of the Supreme Court's relationship to Canada's federal structure. If the federal appeal court's appellate jurisdiction was to extend to both federal and provincial legal issues, then clearly there was to be no division of judicial authority paralleling the division of legislative power. On the contrary the new federal state would have a unitary judicial structure. It was on this point that later, in the debate over the establishment of the Supreme Court, French-Canadian critics would

¹Same, 896-7.

receive support from English-speaking federalists who demanded that judicial and legislative power in a federal state should be co-extensive.¹ But at Confederation this federal issue was barely raised and again perhaps the key reason for the lack of prominence given this point was the fact that under the appellate jurisdiction of the Privy Council Canadians would have, whether they liked it or not, a unitary judicial system.

(ii) From Confederation to the Supreme Court Act, 1875

The main subject of interest in this period is the reaction to the Macdonald government's plans to implement Section 101 of the B.N.A. Act.² Historians who have commented on this subject have explained Macdonald's abandonment of his Supreme Court Bills as largely the result of provincial rights opposition, especially by French-Canadians, to the proposed Court's appellate jurisdiction in provincial

¹ The most vigorous advocate of this federalist position outside of French-Canada was David Mills. See, for example, his letter to Sir John A. Macdonald written in 1870, Macdonald Papers, vol 159 and his speech on the Bill to Establish a Supreme Court, Canada, House of Commons Debates, 1875, 741.

² Bills to establish a Supreme Court were introduced twice, once in 1869 and again in 1870. The establishment of a Supreme Court was announced in the speech from the throne in the second session of 1873 and by the Mackenzie government in the speech from the throne in 1874.

law matters.¹ Macdonald himself, a decade later, referred to Quebec objections as "one of the great reasons" for his hesitating to enact legislation establishing a Supreme Court.²

Certainly the classical Quebec argument against a national appeal court's power to review the decisions of Quebec judges on civil law issues was directed against the Supreme Court bills of 1869 and 1870. It was pointed out to Macdonald that under his proposed court a Quebec suitor who won his case before the Superior Court, the Court of Review and the Court of Queen's Bench in Quebec only to lose, 3 to 2, before the Supreme Court of Canada might, in such a situation, lose his case when eleven judges had been in his favour and only three against him.³ This arithmetic was apt to look even less attractive when it appeared that only two out of seven judges on the Supreme Court would be from the

¹ See, for example, the two most thorough accounts of events relating to the establishment of the Supreme Court: Frank H. Underhill, "Edward Blake, The Supreme Court Act and the Appeal to the Privy Council," 19 Canadian Historical Review (1938) 245, at pp. 245-6; Frank MacKinnon, "The Establishment of the Supreme Court of Canada," 26 Canadian Historical Review (1946) 258, at p. 260. See also, Donald Creighton, John A. Macdonald The Old Chieftain, (Toronto, 1955.) p.194.

² Canada, House of Commons Debates, 1880, 240.

³ This point was made in a letter written by Mr. Justice Meredith, a Quebec judge, to the Department of Justice, Ottawa, Feb. 24, 1870, commenting on Macdonald's 1869 Supreme Court Bill. Public Archives of Canada. Macdonald Papers, Vol. 159.

Quebec bar or bench.¹ Even if these two judges predominated in Quebec appeals, given the fact that they would be reviewing the decisions of Quebec's five-judge Court of Queen's Bench, this would mean, as one Quebec lawyer pointed out, that "deux juges pourront ainsi renverser le jugement de cinq juges aussi capables qu'eux."²

This objection to the General Appeal Court's appellate jurisdiction was supported by considerable doubt as to Parliament's power under Section 101 of the B.N.A. Act to provide for appeals from provincial courts in matters subject to provincial legislative authority. A number of those who corresponded with Macdonald on his Supreme Court plans thought that only the provincial legislatures under Head 14 of Section 92, could give the right of appeal in matters subject to provincial jurisdiction.³ But, it should be noted, Macdonald also

¹The 1869 Bill provided for a seven-judge court with four judges constituting a quorum. The 1870 Bill also called for seven judges, with five constituting a quorum. Neither Bill provided for any specific provincial or regional representation on the Supreme Court's bench. But Macdonald did suggest that he favoured the policy of representing "the different bars in the different Provinces" on the Supreme Court by having two puisne judges from each of Ontario, Quebec and the Maritimes. Under this system Quebec could have expected to have two out of seven, or, if the Chief Justice were from Quebec, three out of seven places on the Court.

²M. Mathieu, "Le Bill de L'Hon. Sir John A. Macdonald Instituté 'Acte Pour Etablir une Cour Suprême Pour La Puissance Du Canada'" in La Revue Legale, (1869) 411, at p. 422.

³P.A.C. Macdonald Papers, vol. 159. See especially the letter written by W.B. Richards, the Chief Justice of Ontario, who was to become the first Chief Justice of the Supreme Court of Canada.

received contrary advice. A memorandum prepared by G.W. Wicksteed summarizing opinions regarding the extent of Parliament's powers under section 101 concluded that the presence of the phrase "notwithstanding anything in this Act" in Section 101 gave Parliament a power to define the jurisdiction of a General Court of Appeal which could override any powers which the Act might elsewhere bestow on the provinces.¹ This constitutional debate over the provinces' power to confer or regulate a right of appeal to the Canadian Supreme Court continued throughout the whole period of the Supreme Court's establishment. The issue was not settled legally until 1908 when the Privy Council declared that in case of conflict between dominion and provincial legislation concerning appeals to the Supreme Court the federal power was paramount.²

But the evidence suggests that during this period the provincial protest against the Supreme Court's review of decisions concerning provincial law was neither as prominent nor as decisive as discontent with the extensive original jurisdiction which was provided for in the first plans for the Court. As indicated above, Macdonald's 1869 Bill gave the

¹P.A.C. Macdonald Papers, vol. 159.

²Crown Grain Co. v. Day [1908] A.C. 504. The Supreme Court had earlier reached a similar conclusion. See Clarkson v. Ryan (1890), 17 S.C.R. 251 and Union Colliery Co. of B.C. v. A.-G. B.C. 27 S.C.R. 637.

Supreme Court an original and in some instances, exclusive jurisdiction in all the significant areas of federal concern.¹ A memorandum prepared for Macdonald reported the reactions of some of his associates to the possibility of setting up the "additional Courts" referred to in Section 101 for the administration of federal laws.² All this pointed to a federal judiciary nearly as extensive as the federal courts of the United States.³

There was a vigorous outcry against these plans. Resentment was by no means confined to Quebec. The Barristers' Society of New Brunswick formally moved a vote of protest against the original jurisdiction proposed for the Supreme Court. This protest was supported by the province's Chief Justice Ritchie and Judge Weldon.⁴ In the replies Macdonald received to his circular letter to the provincial judges

¹ See above pp. 10-11.

² P.A.C. Macdonald Papers, Vol. 159.

³ The jurisdiction vested in the Supreme Court by Sections 55 and 56 of Macdonald's 1869 Bill closely paralleled the judicial power of the United States as set down in Article III, Section 2 of the United States Constitution. See the article by M. Mathieu (cited above p. 23, footnote 2) in which he sets out this parallel but argues that there is no analogous provision in the B.N.A. Act authorizing the federal legislature to establish federal courts similar to those of the United States.

⁴ P.A.C. Macdonald Papers, vol. 159.

asking for their opinions on the Supreme Court Bill, resentment of the Court's original jurisdiction was the criticism most frequently expressed. Most of this criticism was based on the view that, given what at that time appeared to be the overriding importance of federal legal matters, if a federal court or courts were given exclusive jurisdiction over most of these matters they would in large part supersede the existing provincial courts and where federal courts were given concurrent jurisdiction in these areas, this would lead to a great deal of confusion.

This protest against the original jurisdiction of the new Court was effective. Macdonald's second Supreme Court Bill, drafted in 1870, which he explained had been carefully revised in the light of suggestions and criticisms of the provincial judges, reduced the Court's original jurisdiction to cases involving dominion revenue laws, extradition cases and government reference cases.¹ This severe restriction of the Supreme Court's original jurisdiction was, for the most part, carried over into the Supreme Court Act of 1875 and has become a permanent characteristic of that Court. Thus, the main result of these early efforts to implement Section 101 of the B.N.A. Act was not to reduce the appellate jurisdiction of a federal court of appeal over provincial laws but to shatter the possibility of establishing an extensive federal judiciary specializing in the adjudication

¹Bill No. 48, 1870. Sections 47, 50, 51.

of important federal issues.

2. Creation of the Supreme Court-1875

(i) Main Provisions.

The Supreme Court Bill introduced by the MacKenzie government in 1875 in its essentials followed the pattern of Macdonald's 1870 bill. The Court's principal function was to be that of an appellate tribunal with broad powers of review over provincial courts. In civil cases an appeal would lie to the Supreme Court from all final judgments of the highest court of last resort in the province. The only limitation on Quebec appeals was a monetary one: there would be no right of appeal from that province if the matter in dispute was less than \$2000.¹ There was also provision for appeals per saltum from the court of original jurisdiction if both parties consented.² In criminal cases and extradition cases the bill provided for an appeal from the judgment of a provincial court affirming a conviction or refusing an

¹ An Act to Establish a Supreme Court, and a Court of Exchequer, for the Dominion of Canada, 1875. 38 Vict., c. 2, Section 17.

² Same, Section 27. Note that this possibility for provincial litigants to by-pass the higher echelons of the provincial judicial hierarchy en route to the Supreme Court did not require leave of the court of highest resort in the province, nor was it subject to any monetary requirement. Both of these restrictions were later applied to appeals per saltum; see Supreme Court Act, R.S.C. 1952, c. C-259, Section 39.

application for habeus corpus whenever such a court was not unanimous.¹ The original jurisdiction of the Court was extremely curtailed. It was to have a concurrent jurisdiction with provincial courts to issue writs of habeus corpus.² Also it was to function as an Exchequer Court with original jurisdiction in cases concerning federal revenue laws or the Dominion Crown as a party.³

Two changes in the 1875 scheme from Macdonald's earlier proposals call for some comment. First, the number of judges was reduced from seven to six with five constituting a quorum for most purposes.⁴ The only explanation offered by Télesphore Fournier, the Minister of Justice and chief government spokesman for the Bill, was based on the size of Canada's population. Since six judges had been sufficient for the United States Supreme Court when it was first established and at that time the American population was about the same size as Canada's in 1875, Fournier concluded that six judges would be enough for the Canadian Supreme Court.⁵

¹ Supreme Court Act, 1875, Section 49.

² Same, Section 51.

³ Same, Sections 58 and 59.

⁴ Same, Section 3.

⁵ Canada House of Commons Debates, 1875, 1713.

Perhaps the more plausible explanation of the adoption of a six judge court, (which created the obvious problem of the even number of judges producing tie votes) is that this number would make it possible for the Court to have precisely that pattern of regional representation -- two judges from Ontario, two from Quebec and two from the Maritimes -- suggested by Macdonald in 1870. The first set of appointments to the Court certainly conformed to this pattern. And, indeed, with the new western provinces sharing the Maritime places, this pattern, with only two short exceptions, was consistently followed for more than 50 years until the seventh Judge was added to the Court in 1927.¹

The second major change in the 1875 Bill concerned the special provisions for the Supreme Court's adjudication of important federal disputes. It is clear that both Macdonald and the Mackenzie government wanted the Supreme Court to have an exclusive jurisdiction in cases involving the interpretation of the B.N.A. Act. In this one area there was not only an unwillingness to abandon the American system of vesting original jurisdiction in federal matters in federal courts but also an intention to go beyond this and prevent constitutional questions from being reviewed in provincial courts before coming to the federal Supreme Court. Behind this intention was, above all, the desire to keep provincial legislatures from violating the terms of the B.N.A. Act. Indeed,

¹See Chapter III, section I for details of provincial representation on the Supreme Court, especially Table 1a, p. 164

as far as Macdonald was concerned, he does not seem to have believed in the propriety of permitting the Court through judicial review to invalidate Acts of the federal Parliament.¹

But Macdonald had come to doubt that Parliament had the power under the B.N.A. Act to confer original jurisdiction in constitutional matters on the Supreme Court. Consequently in his second bill he relied completely on the device of the federal government's submission of constitutional questions to the Court. The Court's answer to such questions would lack the status of legal judgments and thus not violate any constitutional bar to original federal jurisdiction in this area. At the same time as advisory opinions they might have a "moral effect" on the provinces and provide sound guidance to the federal government in exercising its powers of disallowance.²

¹Section 53 of Macdonald's first Supreme Court Bill gave the Supreme Court an exclusive original jurisdiction to determine the constitutionality of provincial laws but made no reference to judicial review of federal laws. (Bill 80, 1869.) P.A.C. Macdonald Papers, Vol. 159. Also his reference case provisions did not contemplate the application of judicial review to federal laws. (See above, p. 14.). It might be further noted that in commenting on the special provisions of the 1875 Act with respect to the Supreme Court's adjudication of constitutional issues, he expressed the hope that these provisions "would not erect any Court which would in any degree over-ride the Parliament of Canada." Canada House of Commons Debates, 1875, 289.

²Dominion Parliamentary Debates, 1870, 525.

The Liberal sponsors of the 1875 Act obviously shared Macdonald's doubts as to Parliament's power to vest an exclusive or original jurisdiction in constitutional matters in the Supreme Court.¹ But they adopted a more elaborate and, on first glance, bolder expedient for circumventing this problem. They retained the provision for eliciting advisory opinions from the Court, except that they left out any specific reference to constitutional questions so that this Section of the Act vaguely applied to "any matters whatsoever".² But for intergovernmental disputes and constitutional issues a special Supreme Court jurisdiction was established.³ First, controversies between the dominion and a province or between two or more provinces were to be brought to the Exchequer Court with an appeal to the Supreme Court and secondly, questions concerning the constitutional validity of dominion or provincial laws which came up in the course of civil cases in the lower courts were to be removed to the Supreme Court for its decision.

These provisions of the Act were passed with virtually no opposition. One key reason for this is that their coming into force for any province was conditional on the provincial legislature's passing enabling legislation. But even when

¹ Canada House of Commons Debates, 1875, 286.

² Supreme Court Act, 1875. Section 52.

³ Same, sections 54 to 57 inclusive.

this is taken into account it is surprising that more attention was not given to the qualifications of the Supreme Court for the crucial function of judicial review. That this function was recognized as crucial, at least in relation to provincial legislation, was evident from the remarks of members on both sides of the House which referred to the uncertainty caused by the growing number of provincial laws suspected of being ultra vires as creating a paramount need for the establishment of a Supreme Court.¹ But the view of classical federalists or of Quebec spokesmen that the court which "umpires" the federal system should not be solely staffed by central government appointees was not expressed throughout the debate on the Supreme Court Act.

Probably more important than the substantive changes in the 1875 Act was the difference in its sponsors' attitude to Privy Council appeals. Fournier in his speech on first reading asserted his government's desire to eventually have no appeal from the Supreme Court to the Judicial Committee, although he was willing to set this issue aside until the re-organization of the British judicial system, which was then in process, had been completed.² The Liberals' desire to abolish Privy Council appeals and their later acceptance

¹ See, for example, statements by Fournier and Langlois. Canada House of Commons Debates, 1875, 755 and 934 respectively.

² Same, 285.

of an amendment which would at least cut off statutory appeals from the Supreme Court provoked the only serious criticism from the official opposition during the debate on the Supreme Court Act. On the other hand the possibility of the Supreme Court becoming a final court of appeal in matters referred to it gave government spokesman some further grounds, in terms of both convenience and the advantages of an indigenous jurisprudence, for defending the appellate jurisdiction of the new Court.

(ii) The Main Points of Controversy.

There were two principal points of controversy in the debate which took place in 1875 over the creation of the Supreme Court: the argument against the Court's appellate jurisdiction in provincial law matters and opposition to the prospect of abolishing appeals to the Privy Council. Of these, the latter issue provoked the sharpest reaction from Macdonald and most of his party followers. But the issue did not come to a head until nearly the end of the debate when Irving moved his famous amendment and, then, there was considerable misunderstanding on both sides as to its real implications.¹ On

¹ Irving's amendment became Section 47 of the Supreme Court Act and provided that the judgment of the Supreme Court should be final except where the right to appeal to the Privy Council was granted through the exercise of the Royal prerogative. For details concerning the amendment and its consequences, see Frank H. Underhill, article cited above footnote 1 p. 22.

the other hand hostility to the Supreme Court's review of provincial court decisions, especially the decisions of Quebec Courts dealing with Quebec's Civil Code, ran throughout the debate and was the central theme of most French-Canadian criticism of the Act.

For the most part, this protest against the Supreme Court's appellate jurisdiction in legal matters subject to the exclusive legislative jurisdiction of the provinces took the 'classical' form. There was still some feeling that the vesting of this jurisdiction in the Supreme Court by Parliament violated the Constitutional rights of the provinces. But most often criticism was focussed on the policy of "submitting the laws relating to property, to civil rights and civil procedure in the Province of Quebec...to judges, who, for the most part are strangers to their language, their manners, their usages etc."¹ As in the reaction to the Macdonald Bills the main point of attack was the apparently unjust arithmetic involved in permitting a federal court with at most two members trained in Quebec's civil law to review the decisions of five or more Quebec appeal court judges all of whom were legally required to be qualified practitioners in this system.²

Even some of the most prominent Quebec supporters of

¹L.F.G. Baby. Canada House of Commons Debates, 1875, 922.

²See, for example, speech by Henri Taschereau, Same, 739.

the Supreme Court Act had reservations about permitting the Supreme Court to reverse Quebec Courts in civil law matters.

Laflamme, for instance, who was otherwise a strong advocate of a national Supreme Court, proposed an amendment which would forbid appeals to the Supreme Court in all private law cases from Quebec (excluding commercial law cases) in which two Quebec courts had been unanimous.¹ Wilfrid Laurier supported a rather similar amendment.² On the Conservative side, Langlois, who also favoured the establishment of a Supreme Court, argued that the common law judges would be inclined to defer to the opinions of the two Quebec judges in cases involving the French Civil Law; but to cover instances in which this failed to happen, and the common law judges out-voted their civilian brethren, he advocated an amendment requiring the Quebec Court's decision to stand confirmed in such cases.³ Others who were not so favourably disposed towards the general plan for the Supreme Court wanted to go much further and eliminate all appeals to the Court in provincial law matters.⁴

¹ Same, 937.

² Same, 944.

³ Same, 933.

⁴ See, for example, proposals, of H. Taschereau, same, 969; J.A. Quimet, same, 941-2; J.A. Mousseau and E. Cimon, same, 983.

None of these proposals were accepted by the government. The only concession which was made to this general point of view was the adoption of Laflamme's amendment requiring that two of the six Supreme Court judges be members of the Quebec bar or bench.¹

It should be noted that this particular kind of concern about the Supreme Court's appellate jurisdiction was almost entirely confined to French-Canadian representatives of Quebec.² The one point on which this line of criticism was able to enlist support from English-Canadians was where it linked up with a concern for "pure" federalism. David Mills was by far the most vigorous exponent of the latter view insisting that in a federal state, legislative and judicial power should be co-extensive.³ But Mills was nearly

¹ Same, 970. See Supreme Court Act, 1875. Section 4.

² For the only major exception to this see speech by Moss, same, 749, where he argues that since Quebec's civil law was in the form of a written code, it would be easy for the Supreme Court to apply. Moss thought, however, that the application of the Supreme Court's appellate jurisdiction to Ontario presented greater difficulties because a specialized Appeal Court had only recently been established in Ontario and it was doubtful whether another appeal court could be created for that province.

³ Same, 741-3. But note that in the dual system of courts envisaged for Canada legislative and judicial jurisdiction would not parallel each other as closely as in the United States' system, for the provincial courts would have original jurisdiction in cases involving federal laws.

Edward Blake seems also to have come to favour the federal policy of making legislative and judicial jurisdictions co-extensive. See his speech in 1885. Canada House of Commons Debates, 1885, 158.

alone in this anxiety to maintain a division of judicial authority parallel to the division of legislative powers. The French-Canadians showed no inclination to couch their criticism of the Supreme Court's appellate jurisdiction in federalist terms. On the whole, the rationale of their case turned much more on an interest in preserving their own culture than on the logic of federalism. And, on the English-Canadian side, while there were numerous critics of the Supreme Court proposal, their attack concentrated far more on the unnecessary expense that an additional Canadian Appeal Court might impose on both the Government and litigants, than on alleged violations of the canons of federalism.¹

Of course, the Government was not without some means of answering these criticisms of its Supreme Court proposal. Indeed, in replying to the main French Canadian criticism Fournier and the Liberals had one rejoinder which was never available to Macdonald. That was the possibility of terminating appeals to the Privy Council. By at least looking upon this as a real and an attractive possibility they could proclaim the advantages, from Quebec's point of view, of having as a final court of appeal, a tribunal on which there were at least two members of the Quebec bench or bar as opposed to one on which there were none. Of course, Fournier and those who shared his enthusiasm for the abolition of Privy Council

¹See, for example, speeches by
925-6, and later White, same, 968.

Jones, same,

appeals conceded that they could not touch the right of appeal from provincial courts to the Privy Council.¹ But even so, by making the Supreme Court's decision final in cases referred to it, the litigant would be given the option of appealing from the provincial court to the Privy Council or to the Supreme Court. Fournier, Laflamme and others argued that the Supreme Court would be much the more attractive alternative, not only because of the presence on its bench of Quebec jurists but also because it would be much less expensive.² Reference was also made to the Judicial Committee's jurisprudence, pointing out how their Lordships had not hesitated to reverse a unanimous decision of the Quebec Courts in French civil law, and to the difficulties which Canadian lawyers experienced in Privy Council practice. Laflamme, who was later to turn down an invitation to serve as a puisne judge on the Supreme Court, embellished all of these arguments with a spirited appeal to Canadian nationalism in a speech which would have done justice to Edward Blake:

¹ Although some like Laflamme, thought that the provincial legislatures would soon abolish appeals particularly in view of the judicial reform in England which pointed to the likelihood of a Supreme Court of Appeal replacing the House of Lords and the Privy Council. Same, 937.

² Jean Langlois, for instance, estimated that the minimum cost of an appeal to the Privy Council was \$4,000 whereas in the Supreme Court an appeal would probably cost \$1,000 or less. Same, 933.

We are preparing for the future. We have formed laws which meet our wants and which suit our peculiar circumstances and those laws were not and could not be the same as those of England; and on a question of interpretation, the judicial atmosphere in which the English Judges lived was different from that in which dwelt the Judges who were born and brought up in Canada and were acquainted with the wants of the country.¹

Some French-Canadians would have pushed this argument further and argued that for the provinces the only way to establish a truly indigenous judiciary would be to make the provincial appeal courts the final court of appeal in provincial law matters.²

But there were others from Quebec who favoured the retention of Canadian appeals to the Privy Council: Baby and Mousseau, both of whom were strongly opposed to the Supreme Court's review of civil law cases from Quebec, expressed great confidence in the Privy Council as Quebec's final appellate court. Baby thought that a Canadian general appeal court would compare unfavourably with the Judicial Committee which was composed of men "acquainted in general, with the English and French languages, as also with the laws and institutions of England and France..."³ Mousseau contended that the Privy Council would be a much better protector of Quebec's

¹ Same, 936.

² See, for example, Quinet, same, 970.

³ Same, 923.

rights than the Supreme Court was likely to be.¹

One important point to keep in mind in explaining this Quebec support for the retention of appeals to the Privy Council is the wide spread dissatisfaction, with that province's judiciary which existed throughout this period. In 1868 wholesale charges were made by Quebec M.P.'s against the Quebec judiciary, accusing many of the judges of incompetency. One member concluded his contribution to the 1868 debate by stating that "the administration of justice in Lower Canada had never been in such a wretched condition as at present."² In 1873 this discontent became critical when members of the Montreal Bar refused to appear before the Court of Queen's bench until certain reforms were made. Under these circumstances it is not surprising that the opportunity to appeal from Quebec courts to the Privy should have special attractions to some Quebec lawyers and litigants.³ Some evidence of this attraction can be found in the fact that in the years between Confederation and the establishment of the Supreme Court there were far more appeals from Quebec to the

¹ Same, 924.

² Parliamentary Debates, Canada, 1868, p. 148.

³ See, for example, letter written by W.H. Kerr of the Montreal bar, read by Edward Brooks. Canada, House of Commons Debates, 1881, 1296.



Privy Council than from any other province.¹ Although it was possible to interpret this phenomena in a rather different way, as did Justice Minister Fournier: "the right of appeal", he said, "had been rather extensively used, and...considerably abused in the Province of Quebec, by wealthy men and wealthy corporations to force suitors to compromise in cases which they succeeded in all the tribunals of the country."²

At least this much is clear about the abolition of Privy Council appeals: the division of opinion on this issue, compared with the controversy over the Supreme Court's appellate jurisdiction, did not fall along French-English lines. The main lines of division were those of party and, here, the desire of Macdonald's Conservatives to retain the appeal to the Privy Council was based primarily on their concern for preserving Canada's links with the Empire. At this moment of the Supreme Court's birth the contention that a Canadian Supreme Court would be a less objective, and therefore a less effective judicial arbiter of Canada's federal system than the more dispassionate judicial Committee sitting across the sea, was not heard. It remained for British authorities to develop this particular justification for the perpetual subservience of the Canadian Supreme Court

¹ According to Professor Albert S. Abel, the English Law Reports for this period set out 41 judgments in Canadian cases, and that of these, 34 were from Quebec. "The Role of the Supreme Court in Private Law Cases", Alberta Law Review, p. 65. See also speech of Irving giving some figures for 25 year period prior to 1875. Canada, House of Commons Debates, 1875, 744-5.

² Same, 285.

to the Privy Council.¹

Although clause 47 making the Supreme Court's judgments final in all but special "prerogative" appeals to the Privy Council was incorporated into the Supreme Court Act in 1875, within a year of its passage it became clear that this clause was in effect a dead letter. Those Canadians who had been concerned with drafting and debating the clause had assumed a distinction between the legal status of appeals which depended on the special exercise of the royal prerogative and the status of those which were part of the regular administration of justice provided by Imperial statutes. It was thought that clause 47 kept only the former in tact. This distinction was, however, rejected by Lord Cairns, the English Lord Chancellor at the time. Cairns' view that, "the appeal to the Sovereign in Council is one and indivisible,"² was eventually accepted as correct by Edward Blake, the Canadian Justice Minister. Consequently, even though the Imperial Government agreed not to disallow clause 47, this was a hollow victory for Canadian judicial nationalism, for it was accepted by then, on both sides,

¹ See Lord Cairns' Memorandum written in 1876 stating the case for the retention of Privy Council Appeals, quoted in L.A. Cannon, "Some Data Relating to the Appeal to the Privy Council." 3 Canadian Bar Review (1925) 455, at pp. 461-2.

² Same, p. 464.

that clause 47 left the appeal to the privy council unchanged.¹

3. The Supreme Court Under Attack

Throughout the first three decades of its existence the Supreme Court was constantly under attack by both politicians and lawyers. In references to the Court in the law journals and legislative debates of these years, one finds that the Court was almost always the object of criticism, and rarely, if ever, the recipient of congratulations. Even those who believed in a Canadian Supreme Court as an indispensable element in the institutional fabric of the Canadian federation had to acknowledge, in their defence of the Court, that it had not, as yet, been a complete success and that it was necessary to search for ways of strengthening it.² Reading their speeches now they seem to damn with faint praise. On the other hand criticism of the Court by those who were not convinced of the inherent necessity for a Canadian General Court of Appeal was quite unreserved and mounted at times to derision. This criticism is all the more remarkable when we bear in mind the conventional inhibitions against expressing unfavourable opinions of judicial tribunals.

¹ Frank H. Underhill, "Edward Blake, the Supreme Court and the Appeal to the Privy Council." 19 Canadian Historical Review (1938) 260.

² See, for example, Sir John A. Macdonald's candid acknowledgment of the Court's failure to win respect and confidence. Canada, House of Commons Debates, 1880, 239.

(i) Political Motives

At first the attack on the Supreme Court was at least partially prompted by political motives. In 1875 the Court had become a step-child of Alexander MacKenzie's Liberal Administration. Before this when Sir John A. Macdonald was the Court's chief proponent we know that he encountered a great deal of hostility to the Court within his own Party, especially from its Quebec wing. Now this opposition came into the open. A number of Quebec Conservatives tried to turn Liberal sponsorship of the Court to their own political advantage and to their provincial constituents contrasted the speed with which the Liberals had pushed through the Supreme Court Act with the restraint their own leader had shown in this matter. During the 1878 federal election the Court appears to have been a factor of considerable importance in some constituencies.¹ A number of M.P.'s were returned with a mandate to either abolish the Supreme Court or drastically curtail its appellate jurisdiction.² And although

¹ See, for instance, a discussion of the attack on the Supreme Court, staged by Hector Langevin, who was the most prominent of the Court's Conservative antagonists, in the 1878 election campaign in Rimouski, Quebec. Same, 239.

See also, Laurier's reference to the Supreme Court issue in the 1878 election. Same, 1885, 167. The Supreme Court appears also to have been an issue in parts of Ontario. F.W. Strange, conservative M.P. for North York, claimed in 1881 that the Supreme Court question "was one of great importance in the minds of almost every elector." Same, 1881, 918.

² See, for instance, acknowledgments of such commitments by August Landry, Conservative M.P. for Montgomery, same, 1880, 226; and by R.P. Vallee, Conservative M.P. and newspaper editor from Portneuf, same, 1881, 922.

Macdonald was too committed to the Supreme Court to abandon it when he returned to power in 1878, he was sensitive enough to the Court's unpopularity to promise to consider bringing in remedial measures.

Nor did the Liberal Governments' first appointments to the Court do much to alleviate political pressures on the Court. Three of the first six judges came with very respectable judicial credentials. Richards, the first Chief Justice, had been Chief Justice of Ontario, Ritchie was Chief Justice of New Brunswick and Strong, the other Ontario appointee, had for many years been a judge on the Ontario Court of Error and Appeal. But the other three appointments were far less impressive and suggested that with the Liberal Government, as with all of its successors, political connection rather than professional achievement would be a necessary, if not a sufficient, condition for receiving some of its appointments to the Supreme Court bench. Fournier had been a leading Liberal politician, serving in MacKenzie's Cabinet as Minister of Justice, Postmaster General and Minister of Inland Revenue. Henry, had long been prominent in Nova Scotia politics and was a leading figure in the Confederation movement. Although, something of a political maverick, he had spent 16 years in the ranks of the Liberal Party. As for his professional qualifications, all that the editor of the Canadian Law Journal could say, reviewing his appointment, was, "Mr. Henry, from Nova ^{Scotia} ~~A~~ is said to be a fair lawyer."¹. Finally,

¹XI. Canadian Law Jr. (1875) 226.

Jean Thomas Taschereau, the other Quebec judge, while not himself a politician, did belong to a family which certainly enjoyed close links to the Liberal Party. His son, Henri Thomas, a federal Liberal M.P., was later appointed to the Superior Court in Quebec and when poor health forced his early resignation from the Supreme Court, he was replaced by his cousin, Henri Elzéar Taschereau. Both of these latter appointments - "this little family stir" as Auguste Landry, a conservative M.P., referred to them - took place in the last days of the Liberal administration in the fall of 1878 and inevitably were interpreted as being politically motivated.¹

(ii) Professional Criticisms

But while political interests certainly had something to do with the initial agitation over the Supreme Court it could not be said that they were a major determinant of the continued discontent with the Court. This dissatisfaction was expressed for many years after the Court as an institution or members of its bench could be linked politically with the Party which had brought the Court into being. The explanation of this dissatisfaction must be based on substantial grievances with the Court's effect on the administration of justice in Canada.

These grievances were pretty well confined to Quebec and Ontario legal circles. Since neither the Maritimes nor

¹Canada, House of Commons Debates, 1879, 505-6.

the new Western provinces had established specialized courts of appeal, their representatives could not follow Ontario and Quebec lawyers in their unfavourable comparison of the Supreme Court with their own provincial appeal courts. On the contrary they were inclined to welcome the Court as a far more accessible and inexpensive alternative appellate court to the Privy Council. With very few exceptions Maritime M.P.'s spoke favourably of the Supreme Court.¹ The only serious note of dissent voiced by Western spokesmen concerned the lack of Western representation on the Supreme Court bench.²

While the attack on the Supreme Court was launched primarily by English-speaking Ontarians and French-speaking Quebecers these two groups based their respective critiques on quite different factors. The Quebec view point emphasized the now familiar French Canadian complaint that their

¹For example, see speeches by Weldon (New Brunswick) and Blecker (P.E.I.). Same, 1881, 920. Another well known Maritime defence of the Court is the speech of Louis Davies, a future Supreme Court judge, same, 1885, 162-3.

²In the 1875 debate, Bunster, a government supporter from Vancouver, moved an amendment to the Supreme Court Act that would have required one Supreme Court judge to come from British Columbia. Same, 1875, 974. Western agitation for representation on the Court's bench developed again in the 1890's: see 32 Canadian Law J. (1896), 27. In 1902 the Manitoba Bar Association passed a resolution requesting a Western judge on The Supreme Court. Canada, House of Commons Debate, 1902, 410.

French civil law ought not to be interpreted by a Canadian court whose members were predominantly Anglo-Saxon, common law judges. The Ontario critics, on the other hand, concentrated their fire on alleged inadequacies of the Court's procedures and personnel. Their main concern was not that the Supreme Court would dilute the purity of Ontario law but that from a purely technical point of view it would be of inferior quality to either the Ontario Court of Appeal or the Judicial Committee of the Privy Council. Only very occasionally did they verge towards the French-Canadian type of criticism and object to a Court which had only two Ontario judges reviewing the decisions made by a larger number of highly qualified members of the Ontario judiciary.¹

Most often Ontario disparagement of the Supreme Court was based less on the view that some of its members lacked a specialized knowledge of Ontario legal traditions than on the allegation that, on the whole, its membership was not as well qualified professionally to deal with general common law and equity issues as were the more experienced and more active members of the Ontario bench.² Ontario had only recently

¹ Perhaps the best example of this is an editorial in the Canadian Law Journal of 1902 which applied the standard Quebec objection to all the provinces: "Let it be remembered, moreover, that in the Supreme Court there are never more than two judges from any one province. To these two, or perhaps to one of them, is often in effect left the criticism of those four or five judgments of men of at least equal attainments, and having special knowledge of the law affecting their various provinces. Is it likely that a reversal under such conditions would be considered a satisfactory adjudication?" 38 Canadian Law Jr (1902) 63.

² For example, speech by Hector Cameron, Canada, House of Commons Debates, 1879, 1383-4.

reorganized and strengthened its own provincial appeal court, with the result that many lawyers from that province could see no need to subject the decisions of the newly established Ontario Court of Appeals to review by another Canadian appeal court. While all of the Ontario appointments to the Court up until 1902 went to highly respected Ontario judges, appointments from other provinces did not always inspire the same confidence.¹ This lack of confidence was intensified by the feeling that the Court's location in Ottawa would prevent its members from having much contact with the country's best lawyers and jurists who tended to congregate in large cities like Toronto and Montreal.² Many thought that the lack of such contacts coupled with the very light work-load which was predicted for the Court could not help but have very adverse effects on the quality of its jurisprudence.

In 1879 when Keller, an Ontario M.P., launched the first Parliamentary assault on the Supreme Court, by moving first reading of a Bill to abolish the Court, these sentiments were freely expressed in the debate which was allowed to ensue.³ Keller, a non-lawyer, expressed the layman's interest in avoiding the cost of an additional appeal and the

¹ Prior to the appointment of David Mills, the Liberal Justice Minister in 1902, the Ontario appointments had gone to four Ontario judges.

² There was even some agitation to move the Supreme Court from Ottawa to Toronto. 16 Canadian Law Jr., (1880), 99.

³ MacKenzie's motion to give Keeler's bill the 6-month hoist was defeated 120-44. Sir John A. Macdonald and James McDonald, the Minister of Justice, both opposed this motion. Canada House of Commons Debates, 1879, 1375.

upkeep of an unnecessary appeal court. But his Bill also gave such prominent members of the Ontario bar, as D'Alton McCarthy and Hector Cameron an opportunity to record their professional doubts about the Court's merits. In the years following 1879, as lawyers watched the Court at work, their initial doubts were reinforced by objections to certain characteristics of the new Court's behavior.

Some of these complaints were directed against rather minor points such as the undue delays in bringing down judgment, the form of the Court's reports and the inconvenience of the dates set for its sittings. But a more serious source of dissatisfaction was the obvious lack of harmony on the Court's bench. The animosity and disrespect which some of the Court's first judges felt for each other were publicly displayed on a number of occasions and did much to undermine professional respect for the Court.¹ But what was perhaps even more detrimental to the Court's prestige, in the long run, was the almost complete absence of coherence and collaboration in its decision-making system. From its inception there was little or no attempt through judicial management or consultation to reduce the differences between different points of view so as to produce a majority opinion. On the contrary in some of the most important and contentious cases each judge

¹For a discussion of some of these intramural quarrels see Frank MacKinnon, "The Establishment of the Supreme Court of Canada," 26 Canadian Historical Review (1946) 271. See also the shocked reaction to an outburst of squabbling in open court in 38 Canadian Law Jr. (1902), 61.



wrote a separate opinion in which he expressed opinions on many different aspects of the case. As a result many lawyers shared the views of the editor of the Canadian Law Journal who complained in 1880 that "the main difficulty that meets one in considering some of the judgments of the Supreme Court, is upon what grounds does the judgment of the Court rest -- what is and what is not extra-judicial in each particular judgment -- and in the united result which forms the decision of the Court?"¹ The publication of dissenting opinions was bad enough for those accustomed to the unanimity of the Privy Council's "advice" to the throne, but the failure of the Court to clearly identify the ratio decidendi of its majority was then and has remained a source of confusion and hence dissatisfaction to many Canadian lawyers.²

These rather professional and technical objections to the Court continued to be expressed for several decades, but after 1879 they did not spark as intense an outcry against the Court as the more cultural demands of the Court's French-Canadian critics. Whereas in 1879, the debate on Keeler's

¹ 16 Canadian Law Jr. (1880) 74-5.

² Edward Blake was one of the first to present a thoughtful analysis of the inadequacies of the Supreme Court's method of delivering judgments. He advocated the adoption of a style closer to that of the Privy Council, but, above all, stressed that "any judicial divergence of opinion on subjects not necessary to be decided should be absolutely eliminated." Canada House of Commons Debates, 1880, 252-3.

Bill to abolish the Supreme Court was almost entirely an Ontario affair, a year later when Keeler introduced the same Bill, most of his support came from Quebec Members. In 1881, following Keeler's death, Auguste Landry took over the sponsorship of his abolition Bill. In the same year, Désire Girouard, who in 1895 was to accept an appointment to the Supreme Court, brought in a Bill to eliminate the Supreme Court's jurisdiction in matters within the exclusive legislative jurisdiction of the provinces. Landry was back again in 1882 with his Supreme Court repeal Bill and although he and ^{his} French-Canadian supporters apparently gave up the possibility of completely abolishing the Court, for four successive years, from 1883 to 1886, they brought forward measures like Girouard's designed to terminate appeals to the Supreme Court in provincial law matters.

The main theme sustaining all of these efforts was the classical objection of French-speaking Quebecers to the Supreme Court's appellate supervision of their Civil Code.¹ At the beginning of his speech on the 1881 abolition Bill, Landry asserted that the Supreme Court was fast fulfilling the worst fears of the French Canadians. "We see," he said, "everyday judgments of the Court of Queen's Bench,

¹ English-speaking members of the Quebec Bar did not support this traditional objection. See speech by Edward Brooks, a Sherbrooke lawyer, describing a meeting of the Montreal Bar which voted 41 to 24 against Girouard's bill. Same, 1881, 1796.

Court of Appeals and other Courts, revised by, practically, two Judges of the Supreme Court, only two knowing our civil law and their colleagues being obliged to accept their advice, and opinions. So the judgments of five Judges in our Superior Courts are liable to be set aside by only two Supreme Court Judges, and when the two Judges do not agree, such judgments are really reversed by only one of them...¹ Rarely was a particular case cited, as evidence of the deleterious effects which this appeal system could have on the French Civil Code.² But almost all of those who joined Landry's campaign were convinced that, as a matter of principle, it was wrong to subject their distinctive private law to review by such an 'alien' tribunal.

The one new ingredient which was now added to this traditional complaint was the Court's alleged linguistic inadequacies. In the 1880's the allegation that French-speaking lawyers were under a serious handicap when they

¹Same, 1881, 1913. See below quantitative study reported in chapter IV, section 6 for actual number of cases with results such as those described by Landry.

²One exception to this was Girouard's response to Justice Minister, James McDonald's challenge that not a single instance had been cited of the Supreme Court's failure to properly administer Quebec's Civil Code. Girouard cited one case, Johnson v Minister and Trustees of St. Andrew's Church, Montreal (1877) I.S.C.R. 235. Same, 1881, 1301. It is not easy to understand why this case should have been regarded as a leading example of the adverse effects which the Supreme Court was having on the Quebec legal system. The main issue concerned the rights of a pew holder in a Montreal Presbyterian Church. The Supreme Court split 3-to-2 in favour of the pew-holder and both Quebec judges were in the majority.

appeared before the Court was heard almost as often as accusations of its incompetency in dealing with Quebec's private law. M.J. Coursol, a lawyer and ex-judge from Montreal East, in 1881 claimed that "...it is next to impossible for French-Canadian lawyers, not fully acquainted with the English language to appear before the tribunal, only two of whose members can speak French."¹ Others like Joseph Tassé, a French-speaking lawyer from Ottawa, argued that these practical obstacles to speaking French before the Supreme Court were "contrary to the spirit of our Constitution which places the two languages on the same footing."² This protest against the Court's low facility in the French-language was not unrelated to the anxiety over its effects on Quebec's jurisprudence. Quebec jurists were apt to feel that a high level of competency in understanding Quebec's French civil law required, above all, the ability to read French jurisprudence.³ Finally, it should be noted that many Quebec lawyers at this stage held a more favourable opinion of the Privy Council's capacity for dealing adequately with Quebec appeals, not only because, as Mousseau claimed, "there they could argue their cases in their own language,"⁴

¹ Same, 1881, 924.

² Same, 1881, 1301.

³ This was one of the principal contentions of Désire Girouard, perhaps the outstanding Quebec jurist in the House of Commons at the time. See his speech supporting his bill to limit the Supreme Court's jurisdiction. Same, 1293.

⁴ Same, 1879, 1591.

but also because, to quote Girouard, "the members of the Privy Council, are all men versed on French law, they speak fluently the language of French jurists, and can consult and study their opinions, without being reduced to the painful necessity of having translations made for them, as has often been done for the Judges of the Supreme Court."¹

The response of the Court's supporters to these charges was not particularly strong. Those who took up the language issue were inclined to deny that there was any need for a truly bilingual Court. The Prime Minister, Sir John A. Macdonald, in replying to Tassé's complaint about the Court's inability to hear cases in French, dismissed this point as irrelevant on the grounds that "all the counsel of Lower Canada who have really attained any position in the profession can speak English just as well as my honourable friend".² There were also some who were inclined to

dismiss the accusations levelled against the Court's bicultural inadequacies arguing that French-Canadian critics

¹ Same, 1880, 257.

² Same, 1881, 1302. Similarly, Donald McMaster, a Montreal lawyer expressed his faith in linguistic assimilation not bilingualism as the best means of enabling French-speaking lawyers to plead before the Supreme Court: "...it must be said to the credit of the members of the legal profession of French origin in the Province of Quebec that they address our courts with a grace, an elegance, and skill in the English language that puts men of British origin to shame when they attempt to speak the French language." Same, 1885, 160.

over-emphasized the differences between the French civil law and the English common law and that, in any event, "every English speaking judge who sits on that bench has made a study of the Civil Law."¹

But, at least at the outset, the Macdonald government appeared more inclined to treat the Quebec objections to the Supreme Court's adjudication of civil law matters seriously and to look for some way of appeasing those who expressed these objections. The only concrete proposal which this concern produced was a Bill introduced in the Senate by Alexander Campbell, the Minister of Justice, in 1882. This legislation would have applied only to Quebec appeals dealing with "laws which are peculiar to the province of Quebec" and for hearing these cases it would have added to the Supreme Court two judges selected from a panel of Quebec superior court judges.² There were many practical objections to this measure, not the least of which was the disrupting effect it was likely to have on the Quebec judiciary, and the Bill was soon withdrawn. Macdonald later admitted that he had also considered adding civilian jurists to the Supreme Court on a permanent

¹ R.B. Dickey, Canada Senate Debates 1882, 234. A number of other lawyers, French and English-speaking, made the same point, for example, George Alexander, same, 246 and J.J. Curran, Canada House of Commons Debates, 1885, 162.

² Canada Senate Debates, 1882, 231-2.

basis but had ruled this out because it might increase the chances of having the common law judges out-voted by the Quebec judges on common law issues. To back up this fear he claimed that already the actual voting pattern on the Court was developing in a direction exactly opposite to that predicted by the Court's Quebec critics:

I am told that there are few, if any, cases in which the decided opinions and deliberate judgment of the two judges coming from the Province of Quebec have been overruled by the other judges; but I am told also that it is found that frequently the judges from the Province of Quebec have joined with the minority of the other judges of the Supreme Court, and have overruled the decision of the majority of the English judges.¹

Whether or not this was the decisive factor in shaping Macdonald's policy on this matter it is clear that his government made no further attempts to meet the Quebec demands for Supreme Court reform.

It is remarkable that the controversy which revolved around the Supreme Court during these years was not more concerned with the Court's impact on Canada's federal structure. Those from Quebec who demanded the abolition of appeals to the Supreme Court in provincial law matters continued to base their case not on the federal principle of having a division of judicial authority parallel to the division of legislative power but rather on the special requirements of Quebec's legal culture. All of them emphasized that it was only Quebec which they insisted should be given the opportunity

¹Canada. House of Commons Debates, 1885, 164.

to opt out of the Supreme Court's appellate jurisdiction in the field of provincial law. Moreover, there was surprisingly little awareness of the extent to which the Supreme Court's first appointees tended to take a centralist position in interpreting the B.N.A. Act.¹ Landry, in his basic indictment of the Supreme Court, added the charge "that all our provincial rights have been impaired by the judgements of this Court".² But aside from a few rather vague allusions such as this there was no direct attack by provincial rights advocates on the Supreme Court's constitutional law decisions.

Neither the controversy over the Court's appellate jurisdiction, nor its adjudication of Constitutional issues made it an important issue in Dominion-Provincial affairs during this period. At the interprovincial Conference of 1887 which climaxed the provincial rights agitation of the post-Confederation years, there were no provincial demands for abolition or reform of the Supreme Court. Indeed the Resolution which the Conference passed calling for "equal facilities to the Federal and Provincial Governments for promptly obtaining a judicial determination respecting the validity of Statutes of both the Federal Parliament and the

¹ The Supreme Court's first important decisions dealing with the B.N.A. Act displayed a deep concern for upholding federal power especially in relation to Trade and Commerce. See especially, Severn v. The Queen (1878), 2 S.C.R. 70 and City of Fredericton v. The Queen (1880), 3 S.C.R. 505.

² Canada. House of Commons Debates, 1881, 913.

"Provincial Legislatures" went on to say that "any decision should be subject to appeal as in other cases, in order that the adjudication may be final."¹ No mention was made of the advantages or disadvantages of having such cases appealed to the Supreme Court of Canada.

This early series of attacks on the Supreme Court had little to do with the Court's actual decisions either as they affected provincial rights or Quebec's civil code. The case which probably excited the sharpest feelings of hostility in Quebec was Brassard et al v. Langevin.² But this case was concerned neither with Quebec's civil law nor the division of legislative powers under the B.N.A. Act; the issue was whether certain sermons and threats made by parish priests urging their parishioners to vote for the Conservative Party candidate, Hector Langevin, in an 1876 bi-election, amounted to acts of undue influence in contravention of the Dominion Elections Act. The Supreme Court upheld the charge and ruled that Langevin's election was void. This judgment at the time undoubtedly ran directly counter to the prevailing sentiments of the Catholic Church in Quebec. But it is worth noting not only that the Court, which included two French Catholic judges, was unanimous but also that it was one of the Catholic Judges, Taschereau, who most clearly

¹ Minutes of the Proceedings in Conference of the Representatives of the Provinces in the years 1887, 1902, 1906, 1910, 1913, 1918, 1926, p. 27.

² (1877) I.S.C.R. 145.

enunciated the view that the Church's conception of its obligation to direct the consciences of its members in political affairs must give way before the political value of "the free and sincere expression of public opinion in the choice of members of the Parliament of Canada".¹

Nor could the Supreme Court's decisions affecting minority as distinguished from provincial rights be regarded as a source of serious discontent or disillusionment with its adjudication. In the 1890's the Court was called upon twice to decide vital Constitutional issues related to the Manitoba Schools dispute. The case of Barrett v. the City of Winnipeg² in 1891 provided the first real test of the Court's treatment of the educational rights of religious denominations under Section 93 of the B.N.A. Act and Section 22 of the Manitoba Act. On this occasion the Court unanimously ruled that Manitoba legislation requiring Roman Catholics to pay taxes in support of secular public schools was ultra vires. And it is interesting to observe that here two Protestant Judges, Ritchie . . . and Patterson , took the lead in reasoning that the Manitoba legislation even though it left the Catholics free to carry on their own denominational schools, nevertheless by making it necessary for them to pay two school charges in fact prejudicially affected their right to enjoy confessional education. It is true that three years

¹ Same, 195.

² (1891) 19 S.C.R., 374.

later the Supreme Court, in a 3-to-2 decision, ruled that the Roman Catholic minority in Manitoba had no right to appeal to the Governor General in Council for relief from the Manitoba Public Schools legislation.¹ But two members of the majority based their decision on the fact that the Privy Council in overruling the Supreme Court's decision in Barrett v City of Winnipeg had found the Manitoba legislation valid and that this disposed of the matter. The Supreme Court's decision in this case was once again reversed by the Privy Council, a result which naturally met with great approval in French Catholic circles in Canada.² Still, it would seem illogical to infer from this pair of decisions that the Supreme Court was a less trustworthy custodian of the educational rights of religious minorities than the Privy Council for as Professor Scott has pointed out, "If the Supreme Court had been the final court of appeal in this legal battle there would have been a complete victory for the minority claims, since the Manitoba Act would have been invalidated in the first place and therefore no appeal to the Dominion Government would have been necessary."³

¹ In re Manitoba Statutes Relating to Education (1892) 22 S.C.R. 577.

² Brophy v. A.-G. of Man. [1895] A.C. 202.

³ F.R. Scott, "The Privy Council and Minority Rights" 37 Queen's Quarterly (1930) 668, at p. 672.

In summing up this period of discontent with the Supreme Court, it could be said that most of the attack from both French and English-speaking quarters was based much more on the Court's anticipated performance than on its actual performance. French-Canadian suspicion was governed by the view that a Canadian Court with only two of its six members civilian lawyers must inevitably be less capable than Quebec's own court or the learned and cosmopolitan English Law Lords in interpreting Quebec's distinctive laws. English Canadian disrespect stemmed largely from professional doubts of the competency and indeed of the necessity of any appeal court which in terms both of its personnel and location was not at the centre of the common law world.

4. The Acceptance of the Supreme Court

The Supreme Court survived this period of open public attack, but it survived in a very weakened condition. The Court had clearly failed in its first three decades to inspire a significant measure of enthusiasm or respect on the part of the Canadian public generally and least of all from the country's legal profession. This failure does much to explain the postponement in Canada of any widespread agitation to abolish appeals to the Privy Council and make the Supreme Court Canada's final court of appeal. For these years during which the Supreme Court was the target of constant criticism were also the years in which Imperial authorities took a number

of steps to strengthen the Privy Council as the highest court of appeal for the Empire. As a result of judicial reforms introduced in Great Britain in the 1870's and 1880's the Judicial Committee had come to be composed "almost entirely of the most eminent Judges of the Empire".¹ By a series of Imperial Acts, beginning in 1895 the principal judges of the Dominion Courts were qualified to sit on the Committee. Although these changes in the composition of the Judicial Committee were unable in the long run to stem the tide of judicial nationalism in the Dominions, for the time being they tended, in Canada, to reinforce the Supreme Court's subordination to the Privy Council.

(i) Subordination to the Privy Council

For the first half of the twentieth century, until the abolition of Privy Council appeals in 1949, the most important fact about the Supreme Court was simply its position of subordination to the Privy Council in the Canadian judicial hierarchy. It was this subordination, which, more than anything else, explains the cessation of serious public criticism of the Supreme Court. Once Canadians had come to realize the full significance of Dicey's dictum that the Privy Council was

¹ Norman Bentwick, The Practice of the Privy Council in Judicial Matters, (3rd ed. London, 1937), p. 6. Lord Cairns' Appellate Jurisdiction Bill of 1876 provided for four salaried Lords of Appeal who would form the nucleus of both the House of Lords and Judicial Committee of the Privy Council as the Empire's two highest courts. In 1881, another Act was passed to enable Privy Councillors who held or had held the office of Lord Justice of Appeal to be members ipso facto of the Judicial Committee.

"the true Supreme Court of the Dominion,"¹ their critical attention was naturally directed to the Judicial Committee rather than to the Supreme Court. And in the end when the movement to abolish appeals to the Privy Council was finally successful, its success was based far more on discontent with the Privy Council than on admiration for the Supreme Court of Canada.

The Supreme Court was subordinate to the Privy Council in three different ways. In the first place, and most obviously, the Judicial Committee still had the power to review the Supreme Court's decisions. As we have noted the Canadian Government's efforts to terminate appeals in 1875-6 had been abortive, leaving in tact the prerogative right of appeal. Thus, although Canadian legislation did not grant a right to appeal any of the Supreme Court's decisions to the Privy Council, dissatisfied litigants were still free to petition the Privy Council for special leave to appeal from a Supreme Court judgment. In granting leave to appeal, the Privy Council stated that it would be guided by the following principles:

their lordships are not prepared to advise His majesty to exercise his prerogative by admitting an appeal to His Majesty in Council from the Supreme Court of the Dominion, save where the case is of gravity involving matter of public interest or some important question of law, or affecting property of considerable amount, or when the case is otherwise of some public importance or of a very substantial character.²

¹A.J. Dicey. Law of the Constitution (9th ed., London, 1939) p. 168.

²Prince v. Gagnon L.R. 8 App. Cas. 103.

The Judicial Committee also indicated that when the party requesting leave to appeal had voluntarily resorted to the Supreme Court it would expect an even stronger case for appeal to be made out.¹ But even so, this effort to confine appeals to the most important cases hardly diminished the Supreme Court's inferiority to the Privy Council.

Secondly, it was possible in many instances for Canadian litigants to by-pass the Supreme Court all together and to appeal from a provincial court directly to the Judicial Committee. The right of appeal from the Supreme Court of each province to the Privy Council was much larger than that which lay from the Supreme Court of Canada. In addition to the special grant of leave to appeal by the Privy Council itself, legislation or orders-in-council had established in each province an automatic right to appeal in cases meeting certain conditions.² Also in some provinces there was provision for provincial courts to grant leave to appeal. The Minister of Justice informed the House of Commons that appeals to the Privy Council from the Supreme Court since 1867 had outnumbered appeals from the Supreme Court by 329 to 198.³ A great many

¹ Per Lord Davey in Clergue v. Murray [1903] A.C. at p. 521. This would mean that where the petitioner was seeking to appeal from the Supreme Court's judgment in a case in which federal law had compelled him to go before the Supreme Court or in which he was the unsuccessful respondent before the Supreme Court, the Privy Council would be more prepared to grant leave to appeal. See Norman Bentwich, (above p. 63, footnote 1), p. 27.

² For a summary of these arrangements in each province see Norman Bentwich, same, pp. 29-35.

³ Canada House of Commons Debates, 1938, 2163.

of these appeals from provincial courts involved important constitutional questions,¹ so that very often the Supreme Court had no opportunity to adjudicate the most significant disputes affecting Canada's federal structure or the rights of minorities.²

Finally, the most significant and most enduring form of subordination was that which stemmed from the Supreme Court's adherence to the principle of stare decisis. At a minimum stare decisis meant that the Supreme Court like all other Canadian courts considered itself bound by the decisions of the highest court of appeal, the Privy Council. This rule had particular significance in the area of constitutional law, for here the Privy Council did not recognize the authority of any higher tribunal. But beyond this, in non-constitutional matters, the Privy Council considered itself bound by the decisions of the House of Lords, the United Kingdom's ultimate

¹Over half of all the Privy Council's decisions on the Canadian Constitution (77 out of 159) came in cases that were appealed directly from provincial appeal courts. See Peter Russell, Leading Constitutional Decisions. (McClelland and Stewart, 1965) p. xiii.

²For instance, the question of whether the educational rights secured for the Catholic minority in Ontario under s. 95 included the right to schools in which French was the language of instruction, was sent directly to the Privy Council from the Ontario Court of Appeals. The Privy Council denied that there was such a right. Trustees of the Roman Catholic Separate Schools for the City of Ottawa v. Mackell [1917] A.C.62.

appeal court. This fact compelled Canadian Courts, including the Supreme Court, either by the force of logic or tradition to consider themselves bound to follow the decisions of the House of Lords and of English courts of higher or co-ordinate jurisdiction.¹ Indeed the Supreme Court seemed even more reluctant than some of the provincial appeal courts to depart from English precedents.² The real effect of this complete subjection of the Supreme Court's jurisprudence to the authority of English decisions was to sap the Court's initiative for developing its own distinctive solutions to Canadian legal problems. Professor Laskin, one of the best qualified students of the Court's record, looking back over the Court's performance up to the abolition of Privy Council appeals concluded that "It has far too long been a captive court so that it is difficult, indeed, to ascribe ~~anybody~~ of doctrine to it which is distinctively its own, save, perhaps, in the

¹ For critical analysis of the Supreme Court's policy of stare decisis see Gilbert D. Kennedy, "Supreme Court of Canada - Stare Decisis-Role of Canada's Final Court," 33 Canadian Bar Review (1955) 340 & 630. For general surveys of stare decisis in Canada see W. Friedmann, "Stare Decisis at Common Law and under the Civil Code of Quebec" 31 Canadian Bar Review (1953) 723 and P.B. Mignault, "The Authority of Decided Cases" 3 Canadian Bar Review (1925) 1.

² See W. Friedmann, above, footnote 1, pp. 727-9 and Horace E. Read, "The Judicial Process in Common Law Canada," 37 Canadian Bar Review (1959) 265, at pp. 277-8.

field of criminal law."¹

The first two forms of subordination meant that the Supreme Court was completely eclipsed by the Privy Council as the controlling Canadian Court of Appeal. But both these aspects of subordination were completely removed in 1949 when the Supreme Court of Canada became the final appellate court for all Canadian courts. The third element of subordination, however was not so easily overcome. Although there seems to be little doubt that following the abolition of Privy Council appeals the Supreme Court was under no legal compulsion to follow the decisions of the Privy Council and the House of Lords, the Supreme Court did not rush to exercise the full measure of its newly acquired autonomy.² A considerable body of professional legal opinion in English-speaking Canada urged the Supreme Court to become far less

¹ "The Supreme Court of Canada: A Final Court of Appeal of and for Canadians." 29 Canadian Bar Review 1038, at p. 1075.

² The only two explicit statements since 1949 by Supreme Court judges of their policy with respect to stare decisis were: 1) Chief Justice Rinfret who stated that, in the context of private substantive law, "it is fundamental to the due administration of justice that the authority of decisions be scrupulously respected by all Courts upon which they are binding.", In Woods Manufacturing Co. Ltd. v. The King, [1951] 2 D.L.R. 465, at p. 475; and 2.) Justice Rand, in the context of constitutional law, stated that the Supreme Court possessed the same power as had the Privy Council for "revising or restating those formulations that have come down to us" Reference re Farm Products Marketing Act (Ont.) [1957], 7 D.L.R. (2d) 247, at p. 271.

rigid in its application of stare decisis to both the decisions of English courts, and to its own decisions, but the Court has not in any deliberate way shown that it is willing to follow this advice. Thus, any assessment of the influence of the Supreme Court's decisions on Canadian jurisprudence must bear in mind the extent of the Court's deference -- past and present -- to English decisions. Where the Court considers itself bound by these decisions, it will be its policy of stare decisis which is the most important determinant of its impact on Canadian law and society.

ii. The Evolution of Canadian Attitudes to Legal Dualism in the Supreme Court

The twentieth century witnessed a great increase in understanding on the part of both French and English-speaking Canadians of some of the real implications of living in a country in which the two major traditions of Western law, the English common law and the Continental civil law operated side by side. This more sophisticated, and more self-conscious awareness of the problems and possibilities of legal biculturalism influenced Canadian attitudes not only to their legal systems generally, but, in particular, to the Supreme Court as a common appellate court for both the common law and civil law provinces.

After the turn of the century the loud political protest of Quebec representatives against the Supreme Court Court's review of Quebec court decisions in civil law matters virtually died out. There was one final outburst of this

feeling in 1903 when L.P. Demers' Bill to limit the Supreme Court's jurisdiction to federal law matters reached the second-reading stage.¹ On this occasion one Quebec lawyer went so far as to claim that because of the Court's incompetency in civil law Quebec lawyers were anxious to avoid having cases appealed to it: "...the barristers in the province of Quebec, knowing as they do that these judges are not competent to deal with matters of French civil law, generally advise their clients to limit their claims to \$1,999, in order to preclude any possibility of appeal to the Supreme Court".² But Demers' bill generally received much less support than had its predecessors and the motion to give his Bill second reading was defeated after a short debate. Following Demers' efforts there was no further expression in Parliament of the classical Quebec complaint of the Supreme Court's appellate jurisdiction. Even in 1949, during the lengthy debate on the abolition of appeals to the Privy Council, no Quebec spokesman voiced the classical objection as a reason for distrusting the Supreme Court as an ultimate appellate court for all of Canada.

The open parliamentary attack on the principle of allowing a predominantly common law Canadian Court to hear

¹Demers introduced his Bill for the first time in 1902. It got as far as the debate on a motion for second reading in 1903. His same Bill was given first reading in 1904.

²Canada. House of Commons Debates, 1903, 2361.

appeals involving Quebec's Civil Code was replaced by a much more academic concern for identifying the precise effects which the common law influence was having on Quebec's Civil Code. Over the past few decades, and on an increasing scale in recent years, Quebec jurists, both on and off the bench, have addressed themselves to various phases of this question. In some instances their concern has taken the form of revealing elements of Quebec's civil law which, as a result of Supreme Court or Privy Council decisions, have been impregnated with common law legal norms. For example, in some areas of family law,¹ in the law relating to wills² and with respect to those very brief Articles of the Civil Code dealing with civil responsibility,³ a number of writers have drawn attention to the tendency of Anglo-Saxon Judges to employ common law precedents in interpreting parts of Quebec's Code or in filling in lacunae in its provisions. Also there has been some quarrel over the Supreme Court's treatment of French authorities and its failure to discern

¹For a recent example see Léon Lalonde, Comment on the Supreme Court's decision in Taillon v. Donaldson, 33 Canadian Bar Review (1955) 950.

²For example, see Edouard F. Surveyor, "Un Cas d'ingérence des lois anglais dans notre Code Civil." 13 Revue du Barreau (1953) 245.

³See, for example, Louis Baudouin, "Conflits nés de la coexistence juridique au Canada" in La Dualité Canadienne ed. by Mason Wade (University of Toronto Press, 1950).

differences between Quebec's Code and French civil law.¹

But this kind of analysis has, on the whole, focussed not so much on the common-law judges' treatment of substantive points in Quebec's civil law as on the more fundamental way in which common-law judicial techniques have affected the basic form of Quebec's civil law system. Here a number of critical points emerge. The one which has been most often cited is the grafting of the rule of stare decisis on to the civil law system.² Decisions of the Supreme Court and the Privy Council on Quebec civil law have been accepted as binding precedents by Quebec courts. That the strict application of stare decisis is alien to the French civil law tradition is generally acknowledged. However a number of writers have pointed out that the difference between the

¹For example Lacoste, Chief Justice of Quebec, in Vassal v. Salvas (5 Quebec Reports (1896) 349, at p. 357-8) expressed the following opinion of a previous Supreme Court judgment reversing one of his own Court's judgments, "Nous avons décidé la même question dans Taplin & Hunt, mais notre jugement a été renversé par la cour suprême. Nous croyons avec tant le respect de cette cour, qu'elle a été induite en erreur par la jurisprudence française, qui applique un droit différent du nôtre....

Cette décision de Taplin & Hunt bouleverse notre jurisprudence...." But the Quebec Court considered that it was bound by this Supreme Court judgment of which it openly disapproved.

²This point received particular stress in the writings of Professor F.P. Walton on Quebec's civil law system. For example, see his article entitled "The Civil Law and the Common Law in Canada." 11 Juridical Review (1899) 282.

French system of codified law and the English system of case law with respect to the authority of decided cases can be overdrawn.¹ A written code must inevitably leave some openings for judge-made law and although "a single judgement is not a binding authority even on the Court which pronounced it...a series of judgments may be accepted as conclusive."² Besides, where decided cases were looked upon as embodying values essential to Quebec's distinctive culture Quebec lawyers were apt to look to the common-law doctrine of precedent "as a means of safeguarding the traditions and principles inherited from the French law."³

But more serious than the mere application of stare decisis to Quebec's civil law is the contrast which has often been made between the general style of jurisprudence associated with the common-law tradition and that which is considered most appropriate for the interpretation of a codified system of civil law such as Quebec's. What has most often been emphasized here is that Quebec's Civil Code should be treated judicially as a logical system.⁴ This means that in

¹ See, especially, E. Lambert and J. Wasserman, "The Case Method in Canada and the Possibilities of its Adaptation to the Civil Law." 39 Yale Law Review (1929) 1, at pp. 13-16.

² P.B. Mignault (see above p. 67, footnote 1,) p. 11.

³ Friedman, W. (see above p. 67, footnote 2) p. 745.

⁴ For an interesting recent application of this view, see G.V.V.N. Nicholls, Comment on Langlais v. Langlais et al. 29 Canadian Bar Review (1951) 979, at p. 982.

working out its meaning or in applying its provisions to unforeseen circumstances the proper mode of reasoning is deductive: judges should try to infer their conclusion from the basic principles or philosophy embodied in the Code. When it is deemed necessary to go outside the Code itself, French Canadian jurists have been inclined to regard as of equal if not greater authority than previous judicial decisions, the writings of leading French jurisconsults and the original sources of the various articles of the Code, including the official reports of the Commissioners who drew up the Civil Code.¹ But this style of jurisprudence is held to be fundamentally different from the techniques of statutory interpretation normally employed by common-law judges,² techniques which the Privy Council, and possibly some members of the Supreme Court were apt to apply to Quebec's Civil Code. The literal interpretation of statutes favoured by English judges, their unwillingness to consult legislative history, and their superior knowledge of and respect for

¹ See, especially, P.B. Mignault, "Le Code Civil de la Province de Québec et son Interprétation" in University of Toronto Law Journal (1935) 104.

² It should be noticed that expressions of his point of view invariably assume a homogeneous common law judicial technique. Such an assumption hardly does justice to the great body of Anglo-American legal thought which, for the last few decades, has focused on alternative judicial techniques and philosophies within the common law world.

English judicial precedents as compared with French doctrine all ran counter to the method of interpretation favoured by French-Canadian jurists.¹

Those who were concerned about the influence of these alien techniques on Quebec's distinctive private law system could not, of course, attribute this influence solely to the Supreme Court of Canada. To begin with it was clear that with or without the Supreme Court, the judicial structure of Quebec had been thoroughly Anglicized. Professor Louis Baudouin begins his analysis of the impact of common law forces on Quebec civil law with this fact:

L'organisation judiciaire a beaucoup de ressemblance avec l'organisation judiciaire britannique, tout au moins dans sa fonction essentielle, savoir la fonction du magistrat. Le Magistrat dans le Québec, et au Canada, dans les autres provinces d'origine anglaise, n'est nommé qu'après un certain nombres d'années de pratique comme avocat. C'est le même système qui prévaut en Grande-Bretagne, le magistrat n'est pas comme en France un magistrat de carrière. Il y aura donc dans la fonction du magistrat des pratiques d'avocat qui vont se faire sentir notamment dans la forme de la rédaction des jugements.²

As Professor Baudouin points out, not the least of the consequences of the Anglicization of Quebec's courts is that the decisions of their judges have come to take the form of the discursive, personal opinions delivered by common-law judges rather than the anonymous, concise statements of judgment and

¹ For a number of examples of this see P.B. Mignault, Same, and Louis Baudouin, "Méthode d'interprétation judiciaire du Code civil du Québec" 10 Revue du Barreau (1950) 397.

² Same, 399.

supporting motifs such as are given by judges in the continental civil law tradition. Also, while the Supreme Court and the Privy Council may have played a part in applying the common-law method of rendering decisions to Quebec's civil law, the process had much earlier roots. Again to quote Professor Baudouin:

A cela s'ajoute qu'au début de la Cession du Canada la majorité des magistrats chargés de rendre la justice au Québec,...étaient des magistrats anglais. Ils appliquèrent le droit français...selon des manières de penser et une méthode purement britanniques, applicables à la common law. L'habitude de rédiger des jugements sous la forme de décisions anglaises s'est perpétuée et elle devait survivre même à la promulgation du Code de procédure civile du Québec.¹

With regard to those alien techniques of interpretation imposed by Anglo-Saxon judges on Quebec's Civil Code, the Supreme Court was likely to attract less criticism than the Privy Council. No doubt this was partially simply the result of the fact that the Supreme Court was clearly the junior appeal court under the control of the Judicial Committee. But probably the more important explanation was the presence on the Supreme Court of at least two, and after 1949, three judges who had been trained in Quebec's civil law system. Jurists such as Mignault and Baudouin, in elucidating the difference between French and English judicial approaches to the Civil Code, tended to contrast Quebec Courts and the Supreme Court on the one hand with the Privy Council on the other. Indeed to some

¹ Same.

extent the Canadian civilian lawyer's critique of the Judicial Committee's interpretation of Quebec's Civil Code paralleled his common law confrères' criticism of the Judicial Committee's interpretation of the B.N.A. Act. Within both groups there was a desire for a more sensitive adaptation of written laws to changing local circumstances and a belief that such jurisprudence would more likely be forthcoming from indigenous judges.¹

One factor which undoubtedly increased the Supreme Court's stature in the eyes of its Quebec observers was the appointment to its bench of some outstanding Quebec jurists. Two of the more modern appointments brought particularly distinguished civilian scholars to the Court. Thibaudeau Rinfret, who served the Court for 29 years, during the last ten of which he was its Chief Justice, had been a Professor of Comparative Law and Public Law at McGill University for 10 years prior to receiving his Supreme Court appointment in 1924. Mr. Justice Mignault who spent more than a decade on the Supreme Court bench was the author of many scholarly

¹ Compare, for instance Mignault's words "Nos juges sont du terroir; ils connaissent les moeurs, les coutumes et la mentalité canadiennes; les juges anglais ont surtout étudié et pratiqué le droit anglais d'Angleterre; les nôtres ont fait du droit canadien leur éducation légale." (Quoted by Baudouin, same, p. 400) with speeches by English-Canadian lawyers attacking the Privy Council's qualifications for interpreting the Canadian Constitution.

works including an authoritative 9 volume treatise on the civil law of Quebec. Their attitudes to the juxtaposition of the two legal systems in the work of the Supreme Court indicate some of the problems and possibilities of legal biculturalism which leading French Canadian jurists were coming to recognize.

The different approaches which they took to their roles as Supreme Court Judges reflect the different emphases of their academic backgrounds. Chief Justice Rinfret was struck by the opportunities for using comparative law techniques which the bicultural character of the Supreme Court provided. Shortly after his retirement from the bench he summarized these advantages in the following passage:

...Perhaps to one who has not had access to the conferences of the Court, it might be hard to realize the unique service rendered, in the course of the discussions, by the Judges raised in one or the other system of law endeavouring to secure from brother Judges explanations on the meaning and purport of some articles of the Quebec Civil Code, or likewise, of some precedents under the Common Law. When one has been accustomed to a particular aspect of his law, he is most apt to take for granted a particular interpretation, which, very often he has ceased to take the trouble of analyzing. But if he is asked to give some explanation of it, then he is compelled to go deeper into the reason for his interpretation; and one cannot begin to appreciate to what extent and how much more thorough becomes his grasp of the intention of the legislator.¹

Rinfret was inclined to deny that the dual system of laws presented any grave difficulties for the Court and once

¹"Reminiscences from the Supreme Court of Canada" 3
McGill Law Jr. (1956) 1.

remarked that in all of his 29 years of experience on the Court he had not found one case in which the common law and civil law would have yielded different results.¹ Mr. Justice Mignault, on the other hand, so much of whose scholarship had been devoted to the elucidation of the civil law, was concerned, above all, with the judicial enrichment of that law by applying to it those sources of civilian jurisprudence which would most appropriately amplify its meaning. He was very much opposed to importing into the interpretation of Quebec's civil law system authorities from a foreign system. Shortly after taking his place on the Supreme Court he vowed that he would lose no opportunity "to insist that each system of law be administered according to its own rules and in conformity with its own precedents."²

While there was undoubtedly a divergence in Rinfret's and Mignault's responses to legal dualism, what they both contributed to the Court was a very high level of professional legal competence. Judges of their stature, were

¹ Same, p. 2. Mr. Justice Cartwright later made the same assertion, "Reflections on the Supreme Court". 45 Law Library Jr. (1952) 438, at p. 447.

² "The Authority of Decided Cases." 3 Canadian Bar Review (1925) 23. Note that the contents of this article had originally been delivered as lectures to the students of the Faculty of Law of McGill University in April, 1921.

undoubtedly much more able to dominate the Court's decision-making in their fields of expertise. This is borne out by the voting record of the Court in Quebec Appeals during the years in which they were members of the Court. During their periods of tenure there were very few decisions in Quebec appeals which found the Quebec judges split or defeated by their common law brethren. On the contrary, in the vast majority of Quebec appeals, the Court was unanimous and the decision was given by a civilian judge.¹

But the presence of Quebec jurists, even very eminent ones, has not convinced all Quebec lawyers that the Canadian Supreme Court is much better qualified than the Judicial Committee to serve as an ultimate court of appeal for Quebec's private law system. Many would no doubt agree with Albert Mayrand when he asks "La cour suprême, n'est-elle pas exposé à jouer inconsciemment, sur le plan canadien, le rôle d'uniformisation du droit qu'on reproche au comité judiciaire du Conseil Privé d'avoir joué sur le plan impérial?"² Also, the comparative law advantages of the Supreme Court may not appeal to those whose main concern is to preserve the purity of Quebec's civil law system. And even those who are more

¹ See Chapter IV, Section 6, comments on Tables 11a to 11d., especially pp. 390-391.

² "Le droit comparé et la pensée juridique canadienne." 17 Revue du Barreau (1957) 1, at p. 2.

prepared to see the Civil Code augmented or extended by means of novel or alien precepts might prefer to see this process undertaken by the Quebec legislature rather than a federal court.¹

At least this much can be said about the evolution of French Canadian attitudes to a supra-provincial appeal court: by 1949, little, if anything, was left of that high regard which an earlier generation of Quebec lawyers had shown for the Judicial Committee's competency in French Civil law. This was as true of its bilingual qualities as of its knowledge of Quebec's Civil Code and its supporting jurisprudence. English-speaking Canadian judges were more apt than members of the Privy Council to be sensitive to the peculiar challenge posed by the dualism of Canada's legal culture. Not very many English Law Lords would be likely to subscribe to Mr. Justice Cartwright's view that for members of the Supreme Court "It is one of our duties to be bilingual".² But the erosion of admiration for the Judicial Committee does not, however, appear to have stimulated very much enthusiasm within Quebec for the abolition of appeals to the Privy Council. In part, at least, the disillusionment with the Privy Council's

¹ This point was recently made in a paper entitled "La Cour Suprême du Canada et l'application du droit civil de la Province de Québec" read by Dean Agard to ^{the} Conference on the Supreme Court and Federalism held at the University of Toronto Law School, 1964.

² "Reflections on the Supreme Court" 45 Law Library Jr. (1952) p. 446.

treatment of Quebec's civil law was counter-balanced by approval of its interpretation of the B.N.A. Act. Commenting on the Privy Council's prestige in Canada Professor Baudouin remarked that "Cette autorité a été favorisée par le fait également que dans certaines matières de droit constitutionnel, par exemple, le Conseil Privé a pu juger tantôt en faveur des droite des provinces, lorsque le vent était à l'autonomie provinciale..."¹

Indeed looking to the Supreme Court's future régime as Canada's final court of appeal Quebec hostility was more likely to be aroused by distrust of its capacity for acting as a fair arbiter of Canada's federal system than by the view that it was an inappropriate tribunal to review Quebec's Civil Code. The development of the latter feeling would depend very much on which legal philosophy became most influential among Quebec jurists: whether legal dualism would be looked upon as a positive good to be enhanced by the bicultural composition of the Supreme Court or whether the integrity and purity of Quebec's civilian tradition would be regarded as a nobler aspiration and one which was threatened by the existing organization of the Supreme Court.

(iii) The Agitation to Abolish Privy Council Appeals

Canadian interest in abolishing appeals to the Privy

¹ Baudouin, see above page 75, footnote 1, p. 446.

* There is no page 82.

Council had, of course, been shown as early as 1875 when the Liberal Government of the day had unsuccessfully endeavoured to curtail the right of appeal from the Supreme Court of Canada to the Privy Council. Again, in 1888, three years after the Privy Council had granted Louis Riel an appeal,¹ a Dominion statute purported to prohibit Privy Council appeals in criminal cases.² This legislation remained unchallenged until 1926 when the Judicial Committee found it invalid on the grounds that it was repugnant to overriding Imperial legislation -- a decision which stirred up considerable controversy in Canada. In the meantime opposition to Privy Council appeals had been constantly fed by resentment of the great expense such appeals imposed on Canadian litigants, by the fact that Dominion cases sometimes appeared to be treated as of secondary importance by the English Law Lords and in some instances by disgruntlement with some of the Privy Council's actual decisions.⁴

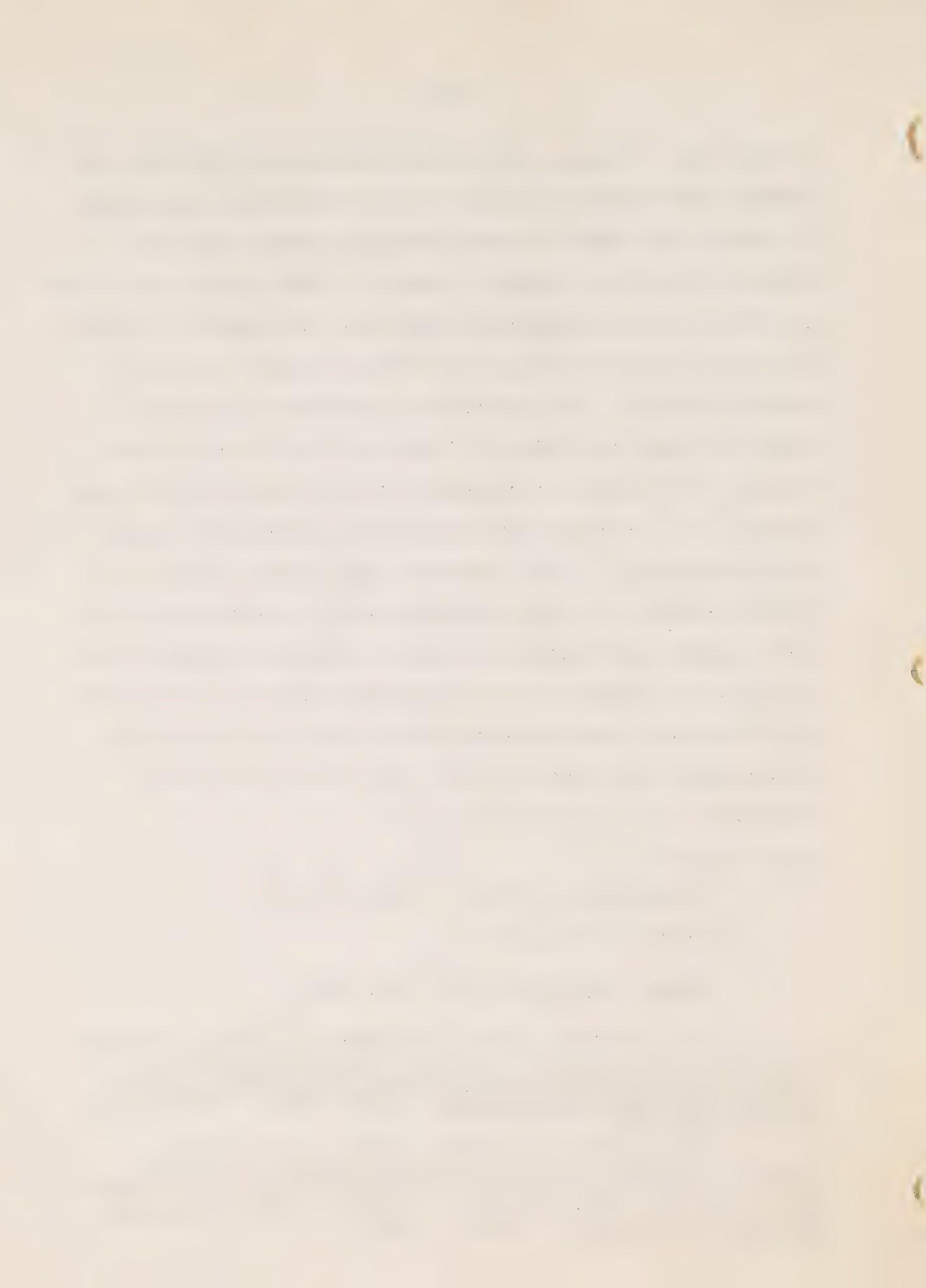
¹ Ex Parte Riel, (1885) 10 App. Cas. 675.

² 51 Vic., c. 43, S. 5.

³ Naden v the King [1924] A.C. 482.

⁴ For a summary of the development of these, and other objections in Canada and the other Dominions see Hector Hughes, National Sovereignty and Judicial Autonomy in The British Commonwealth of Nations (London, 1931). Especially chs. IV and VIII.

John S. Ewart's "Judicial Appeals to the Privy Council: the Case for Discontinuing Appeals." 37 Queen's Quarterly (1930) 456, contains a vigorous statement of Canadian complaints. See also ch. 5 of Coen G. Pierson, Canada and the Privy Council, (London, 1960).



But the main force behind any really serious opposition to Privy Council appeals was a growing sense of Canadian nationalism. As Canada drew closer to realizing complete self-government in the legislative and executive spheres, there was an increasing tendency, to regard Canada's judicial subordination to the Privy Council as an anomalous contradiction to this general pattern of autonomy. To all of the arguments put forward for retaining the Privy Council appeal -- whether they turned on the importance of the Imperial link which the Judicial Committee allegedly provided or the superior capacities of the Judicial Committee's members for dispensing Canadian justice -- the judicial nationalist was apt to reply with the question posed by John Ewart, "Is there any reason why, of all the countries in the world in population and intelligence equal with Canada, our great Dominion should be the only state that is willing to acknowledge its inability to settle its own lawsuits?"¹

It was not until the 1930's that this nationalist desire to abolish Privy Council appeals became an important political agitation in Canada. Then, two developments were of crucial importance in the emergence of the abolitionist movement as a significant and effective force. The first of these was the Statute of Westminster which legally capped the achievement of Dominion status. The Statute of

¹Ewart, above page 84, footnote 4 p. 473.



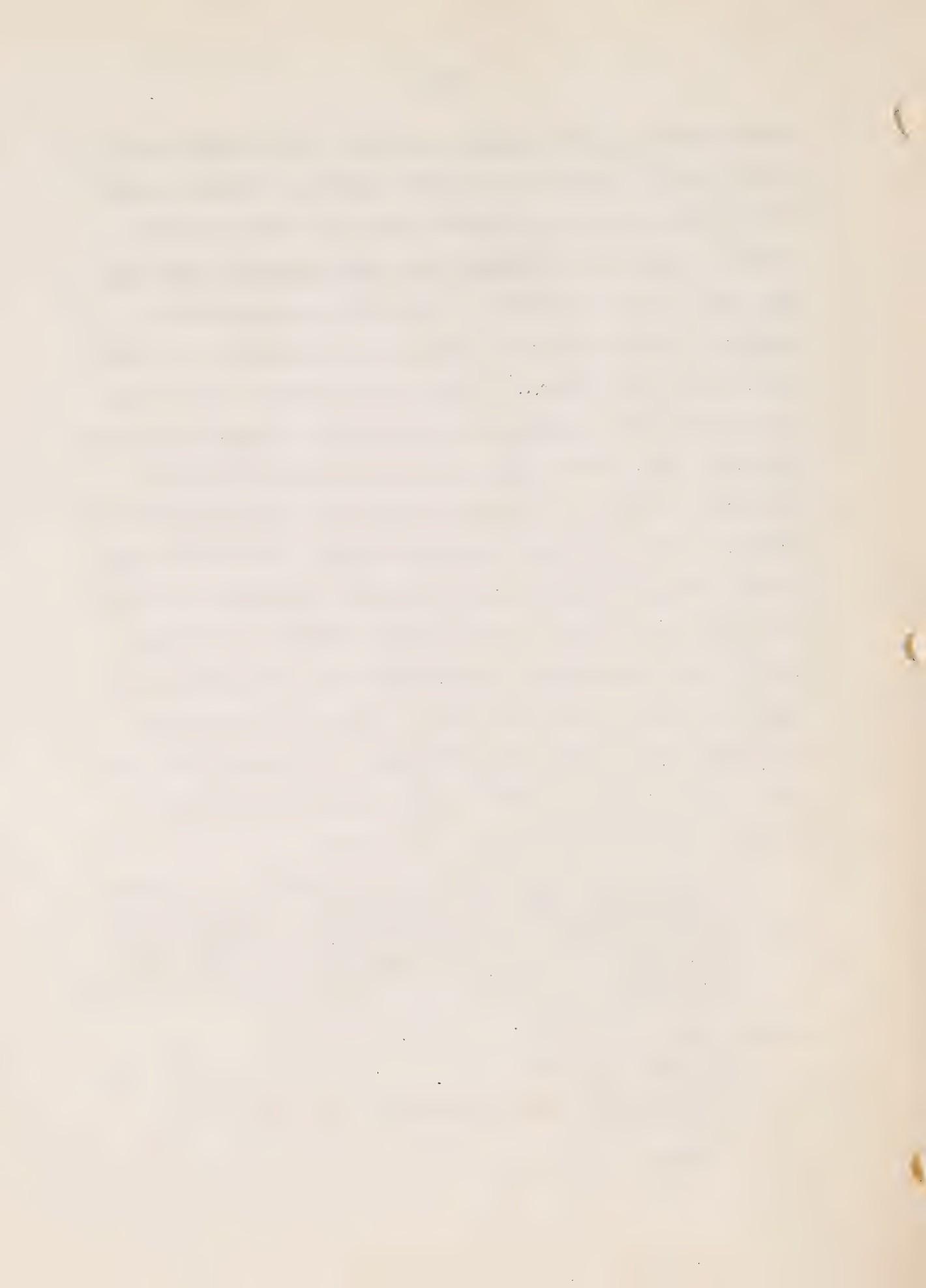
Westminster at least removed the legal bar to abolishing Privy Council appeals in matters subject to federal legislative jurisdiction -- a point which the Privy Council, itself, confirmed in British Coal Corporation v. the King.¹ This left as the only serious constitutional question regarding the abolition of appeals, the question of whether the Dominion Parliament had the power to make the Supreme Court, Canada's exclusive ultimate court of appeal not only in federal law matters but also in those fields of law subject to provincial legislative power. This question was finally settled, in the Dominion's favour, in 1947 by the Privy Council.² The Judicial Committee's judgment at that time was clearly based on the implications which it saw flowing from the Statute of Westminster. Speaking for the Committee, Lord Jowitt, gave the following explanation of their Lordships' reason for reading into Section 101 of the B.N.A. Act a federal power to establish an exclusive and general final appellate court for Canada:

To such an organic statute the flexible interpretation must be given which changing circumstances require, and it would be alien to the spirit, with which the preamble to the statute of Westminster is instinct, to concede anything less than the widest amplitude of power to the Dominion legislature under s.101 of the Act.³

¹[1935] A.C. 500.

²A.-G. Ont. v. A.-G. Canada [1947] A.C. 127.

³Same, p. 154.



The legal consolidation of Dominion autonomy had apparently converted the members of the Judicial Committee to judicial nationalism too.

The Statute of Westminister was then the key factor in clearing away the legal obstacles to the abolition of appeals. But the decisive factor in creating a political basis for terminating Privy Council appeals was the series of constitutional decisions rendered by the Judicial Committee in the 1930's which invalidated some of the essential legislation in the Canadian government's attack on the consequences of the depression. These decisions together with the precedents they applied convinced many Canadians that the Judicial Committee's interpretation of the B.N.A. Act had imposed a constitutional straight-jacket on Canada which prevented its central government either alone or in cooperation with the provinces from dealing effectively with nationwide social and economic problems.¹ Those who shared this dissatisfaction with the Privy Council's interpretation of the Constitution now had a very substantial reason for advocating that Canada exercise her newly acquired powers of

¹ Expressions of this feeling are far too numerous to summarize but some of the more definitive were Brooke Claxton, "Social Reform and the Constitution" Canadian Jr. of Economics and Political Science (1935) 409; W.P.M. Kennedy, "The British North America Act: Past and Future", 15 Canadian Bar Review (1937) 485. Also, of course, this theme was woven into the argumentation of much of the Rowell-Sirois Commission's Report on Dominion Provincial Relations. See esp. Book I, ch. IX of the Report.



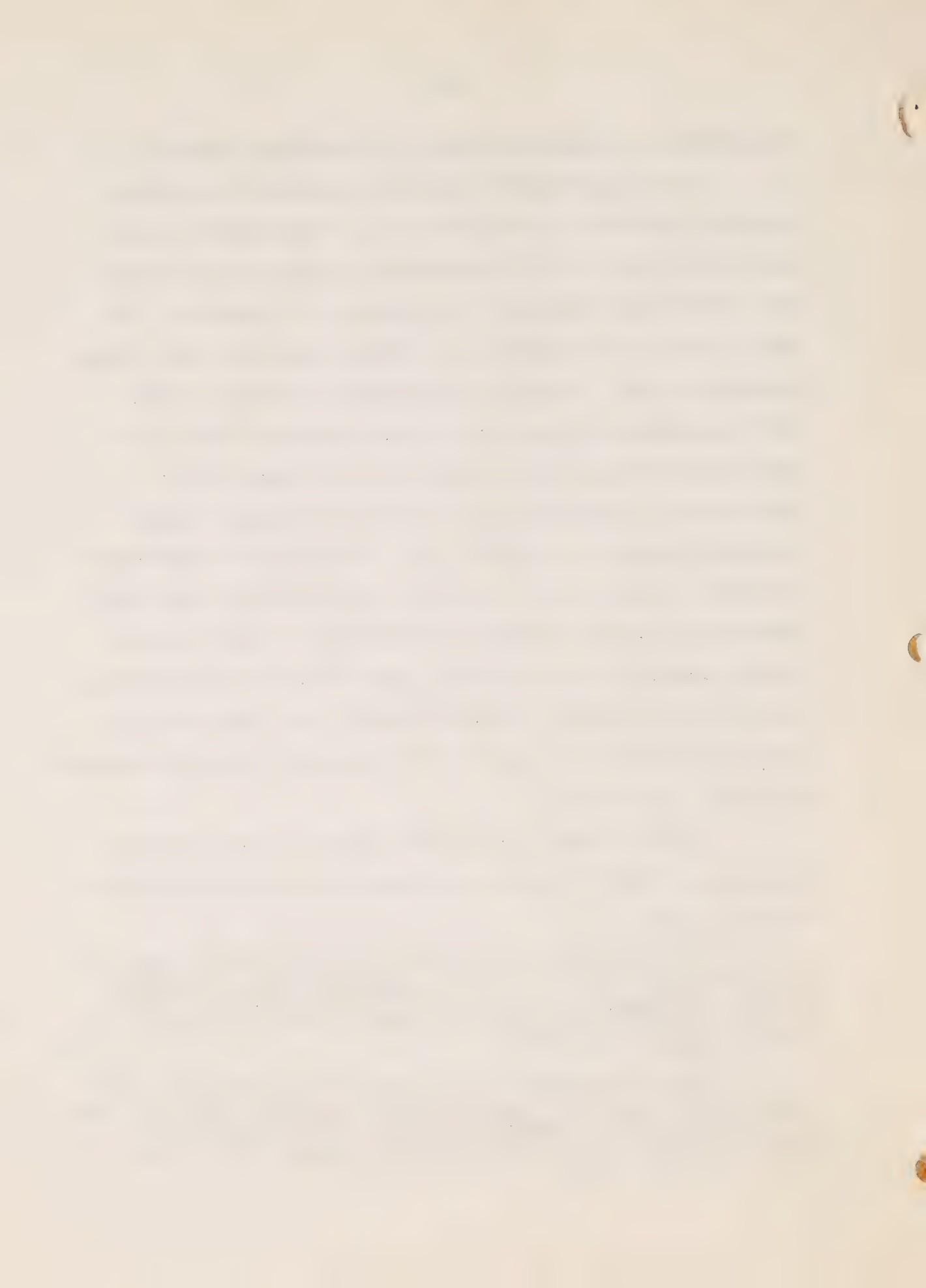
nationhood and terminate appeals to the Privy Council.

It is significant that this reaction to the Privy Council's treatment of the division of legislative powers under the B.N.A. Act elicited strong support from within the Conservative Party for the abolition of appeals. Indeed it was an ex-Conservative Cabinet Minister, M.C. Cahan, a veteran of the Conservative administration whose "New Deal" programme had been so seriously emasculated by the Privy Council's decisions, who, in 1938, launched the Parliamentary assault on the Privy Council appeal which eventually lead to its abolition.¹ Hostility to the decentralizing tendencies of the Privy Council's decisions also found ready support within the CCF party.² Thus when the Liberal administration endorsed the objective of abolishing Privy Council appeals it did so knowing that this policy would not be seriously opposed by either of its major national political competitors.

It was not surprising that neither Justice Minister Lapointe in 1938-39 nor Justice Minister Garson in 1949 put

¹Cahan introduced his first bill to abolish appeals in federal law matters in 1938. Canada. House of Commons Debates, 1938, 313. He introduced another abolition bill in 1939 which applied to all classes of appeals from all Canadian courts. Same, 1939, 2811.

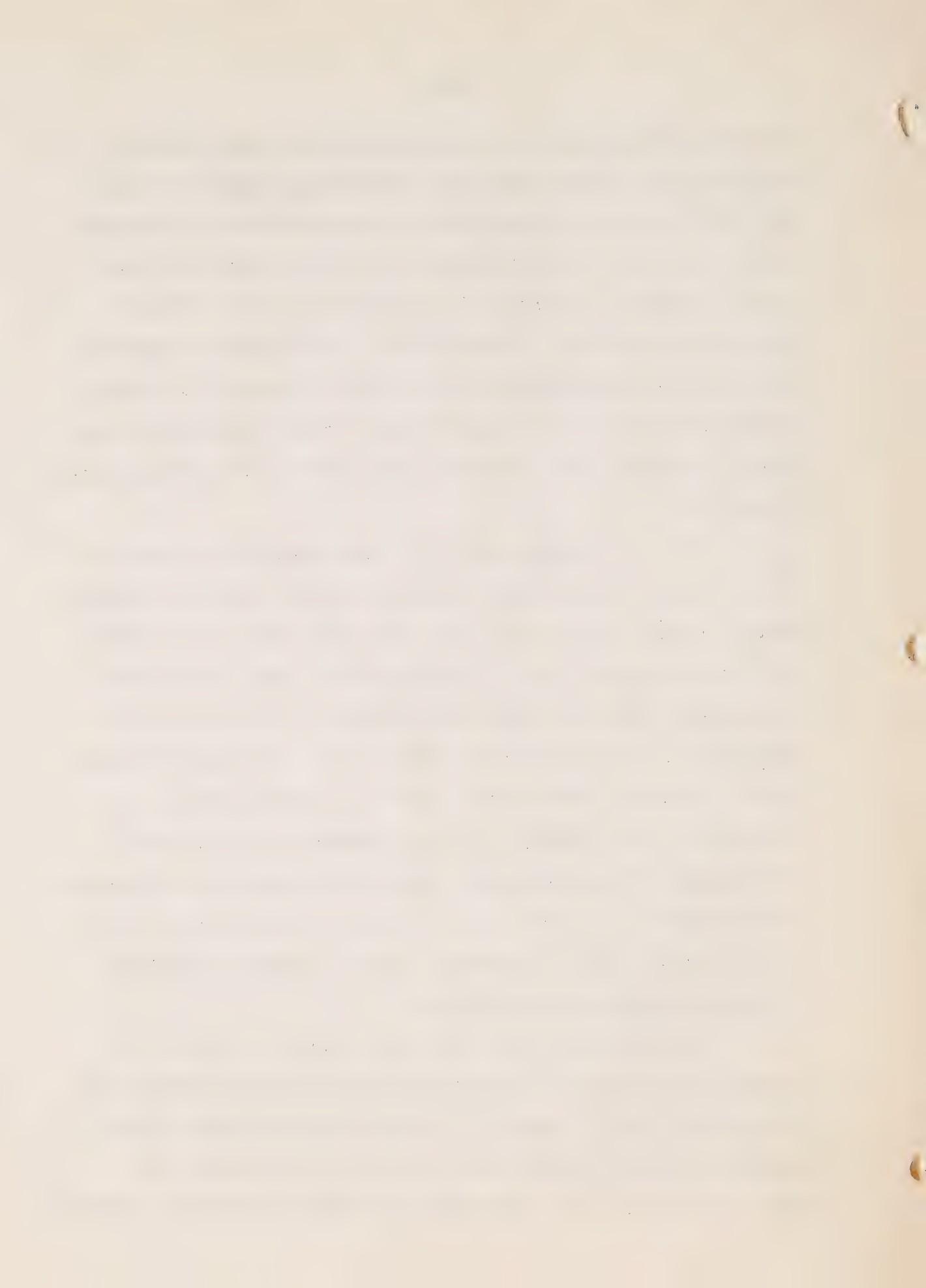
²See, for example, M.J. Coldwell's support for the abolition of appeals. Same, 1949 2nd Session, 199-202. Also C.C.F. Member F.E. Jaenke introduced a bill to abolish appeals to the Privy Council in 1947. Same, 1947, 2355.



forward antagonism to the Privy Council's constitutional decisions as a prime reason for abolishing appeals. They were both too wary of provincial sensitivities to base their case for establishing the supremacy of the Supreme Court on opposition to the Privy Council's tendency to bolster provincial autonomy. However their rather simple argument that national sovereignty required the abolition of appeals became much more convincing when set in the context of widespread disgruntlement with the Privy Council's constitutional handiwork.

For our purposes here the most significant aspect of this reaction to the Privy Council's constitutional interpretation and the force which this reaction added to the agitation for the abolition of appeals is the light which this development sheds on Canadian attitudes to the role of the judiciary in constitutional adjudication. It was not enough for the Judicial Committee's critics to simply attack the tendency of that tribunal's constitutional jurisprudence to strengthen the provinces' legislative powers at the expense of the dominion's. They had to show not only that this was bad policy but that it stemmed from an improper technique of constitutional interpretation.

On this point there were two distinct schools of thought among the politicians and constitutional experts who attacked the Privy Council. First there were those, more prominent in the ranks of the professors than among the Parliamentarians, who criticized the Privy Council for having



failed to bring to the interpretation of the Constitution enough of that deliberate statesmanship that would adjust the terms of the Constitution to the country's changing environment. V.C. MacDonald was one of the most articulate members of this camp. He attacked the Privy Council on the grounds that "being free to mould the Constitution within large limits in a way consonant with changing needs, the Privy Council refrained from doing so; and thereby has left us with a Constitution ill-adapted to government under present conditions and modes of thought."¹ Aware of the large opportunities for judicial law-making which the Constitution inevitably imposed on its judicial interpreters, those who shared MacDonald's view advocated that judges should apply to this task of judicial review a deep understanding of the consequences of their decisions on the capacity of Canadian legislatures -- Dominion and provincial -- for meeting the country's pressing needs.

On the other hand there were those who opposed the Privy Council's treatment of the B.N.A. Act not because of its failure to impart into the process of constitutional interpretation enough knowledgeable awareness of the policy implications of judicial review but on the contrary because it had read into the Constitution a policy of provincial autonomy which, they alleged, contravened the intentions of the framers of the B.N.A. Act and the clear meaning of the

¹"The Privy Council and the Canadian Constitution"
29 Canadian Bar Review (1951) 1024, at p. 1035.



Act's central provisions. The most influential spokesman of this viewpoint was William F. O'Connor, the Parliamentary Counsel to the Senate who was commissioned in 1938:

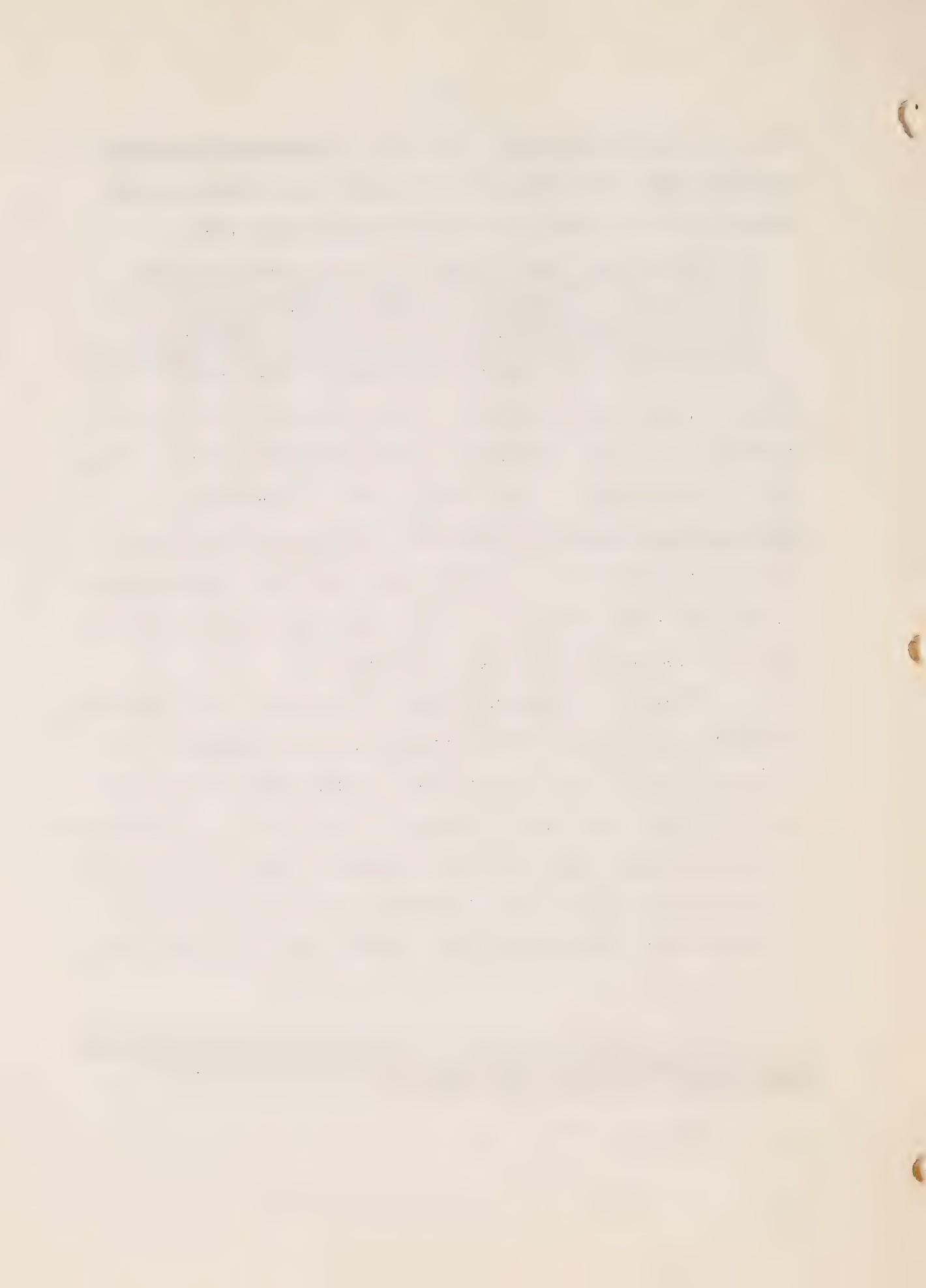
To compare the text of Part VI of the British North America Act, 1867, headed "Distribution of Legislative Powers" with (a) such pre-Confederation records and (b) such pronouncements of the Judicial Committee of the Privy Council as define or disclose the legislative powers of the Parliament of Canada at the present time.¹

O'Connor prefaced his report to the Senate with the basic assertion that the distribution of legislative powers originally incorporated in the B.N.A. Act "was repealed by judicial legislation and different legislative machinery was substituted". He concluded that "in these circumstances I think that not amendment of the Act, but enforced observance of its terms is the proper remedy."²

These two divergent points of view had one important assumption in common. They both took it as axiomatic that the application of the appropriate techniques of interpretation to the B.N.A. Act, whether in the form of a larger dose of knowledgeable judicial statesmanship or greater fidelity to the true meaning of the Constitutional text, could only be achieved by transferring the highest judicial power from

¹The Senate of Canada. Report to the Speaker by the Parliamentary Counsel Relating to the Enactment of the British North America Act, 1867 etc. p. 7.

²Same, p. 12.



English to Canadian judges.¹ This common assumption was their counter argument to the old contention of the Privy Council's defenders that the very distance of the Judicial Committee from active involvement in the Canadian scene "removes causes from the influence of local prepossession".²

Now the abolitionists were inclined to argue, as had Edward Blake 75 years earlier,³ that only Canadian judges with the first-hand experience of living within Canada's federal system could provide an intelligent and responsible interpretation of the country's federal constitution.

The belief in the superior qualities of the Privy Council for mediating Canadian constitutional controversies

¹ F.R. Scott's reaction typified this stream of thought. "No alterations to the B.N.A. Act," he wrote, "will ever achieve what Canadians want them to achieve if their interpretation is left to a non-Canadian judiciary." 15 Canadian Bar Review (1937) 485, at p. 492.

² This argument was put forward by the Judicial Committee as early as 1871 in rejecting the Australian colonies' request for the abolition of appeals. See John S. Ewart, The Kingdom of Canada and Other Essays, (Toronto, 1908) p.226.

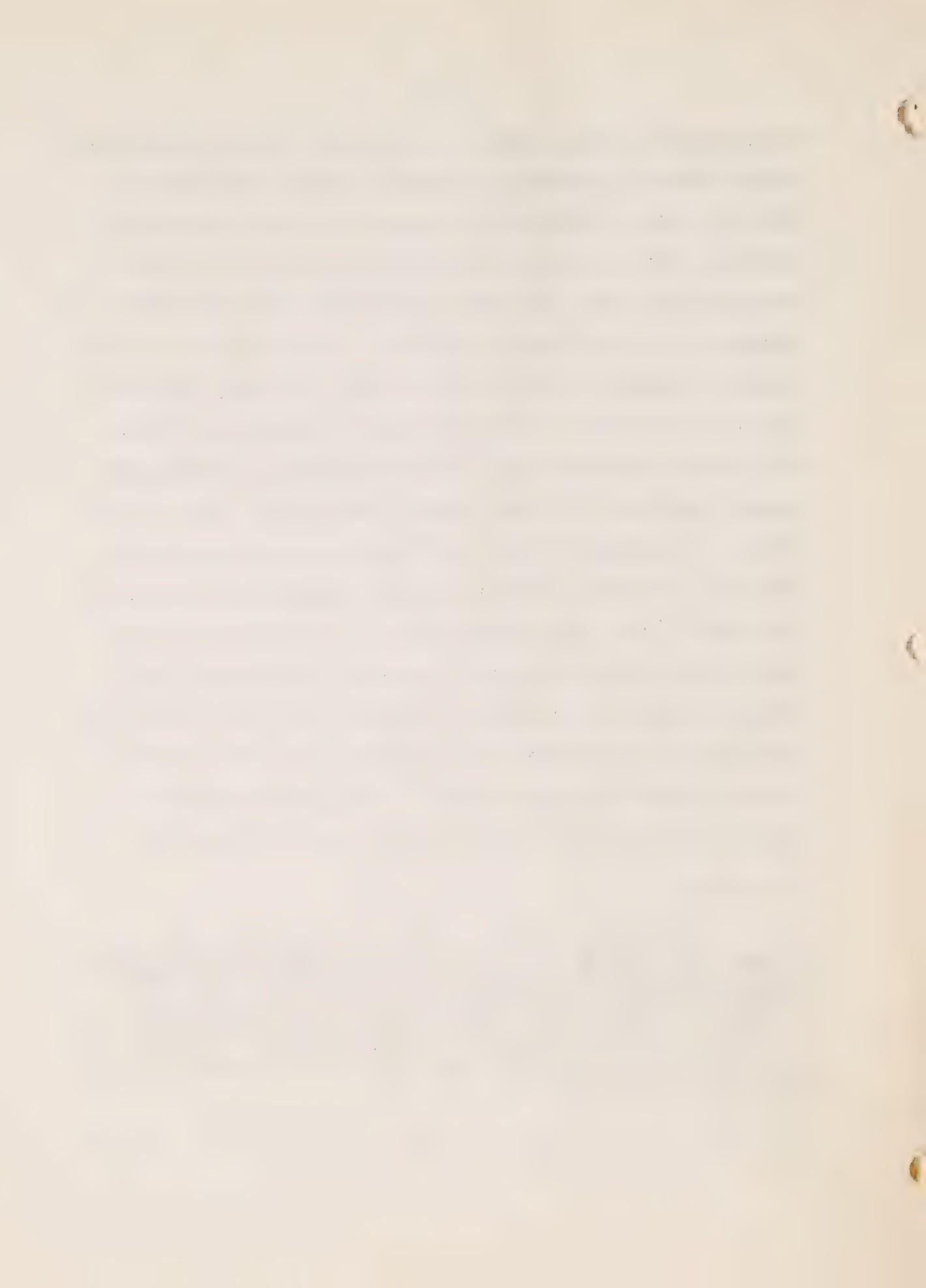
³ Canada. House of Commons Debates, 1880, 253-4. Blake later, in part, changed his mind on this point. In 1900 he explained to the British House of Commons that his Canadian experience had taught him, "That where bitter controversies had been excited, where political political passions had been engendered, where considerable disputation had prevailed, where men eminent in power and politics had ravaged themselves on opposite sides, it was no disadvantage, but a great advantage to have an opportunity of appealing to an external tribunal such as The Judicial Committee, for the interpretation of the Constitution on such matters. England. House of Commons Debates, 4th Series, vol. 83, May 21, 1900, 774.



had presumably been based on two beliefs -- that it would be a more reliable guardian of minority rights and that it would be a more impartial arbitrator of federal-provincial disputes. But it had become difficult to square either of these theories with the realities of the Judicial Committee's judgments in constitutional matters. On the question of the rights of minorities within provinces, the Privy Council's decisions could hardly be viewed as demonstrating an unusually broad interpretation of the educational rights guaranteed religious minorities under section 93 of the Constitution. In neither of the two twentieth-century tests of the Privy Council's attitude to this question did it uphold the claim of the aggrieved minority.¹ As for the alleged impartiality of the tribunal, not even the Judicial Committee's staunchest supporters denied that on the whole its approach to the division of legislative power in Canadian federalism had been governed by an overriding concern to protect the autonomy of the provinces against suspected

¹

The first of these cases is referred to above on page 66, footnote 2. In the second, Roman Catholic School Trustees for Tiny v. The King [1928] A.C. 363, the Judicial Committee rejected the claims of Ontario Roman Catholics to apply the educational rights secured under Section 93 of the B.N.A. Act to Catholic secondary schools. It should be noted that the Supreme Court split in this case on religious lines, 3 to 3.



federal encroachments.¹

While these developments made it increasingly more difficult for retentionists to defend the continuation of Privy Council appeals on the basis of its dispassionate objectivity in ~~umpiring~~ federal and ethnic conflicts in Canada, still, the arguments of the abolitionists raised serious dilemmas for the future exercise of judicial review by a Canadian tribunal. Both those who advocated a more adept adjustment of the written Constitution to the nation's changing needs and those who wanted the Constitution interpreted in terms which were more strictly in accordance with the intentions and ~~words~~ of its framers tended to imply, in calling for the abolition of Privy Council Appeals, that if Canadian judges followed these recommended approaches, they would come to unambiguous and uncontroversial results. But this inference is difficult to maintain. After all there is likely to be a considerable dispute among well-informed Canadians as to what constitutional adjustments the country requires. There were many Canadians in 1949 as there are now who would look upon a regard for provincial autonomy as

¹Unless, of course, it is possible to equate impartiality with a concern for provincial autonomy. Perhaps one of the most authoritative witnesses of the Privy Council's policy of upholding provincial autonomy is provided by Lord Haldane's description of his own and Lord Watson's achievement as custodians of Canada's Constitution. See 11 Judicial Review (1899) 279 and 1 Cambridge Law Jr. 143.



the consideration which ought to govern judicial statesmen in applying the B.N.A. Act.¹ Also, among those who believe that judges should above all be true to the intentions of those who designed the Confederation pact, might be found many who, unlike O'Connor, believe that such a course would not lead to results substantially different from those wrought by the Privy Council's decisions.

What the debate over the abolition of Privy Council appeals really revealed was that in deciding whether challenged legislation fell under the jurisdiction of the provinces or the dominion, the courts would have to make decisions that could not be exclusively determined by purely legal considerations and that these judicial policy choices could have a decisive effect on the balance of power within the Canadian federal system. Given a wide-spread acknowledgement of this inescapable implication of judicial review the important question by 1949 was not whether Canada should enjoy judicial autonomy but how the Privy Council's Canadian replacement should be best organized to fulfil its role as the judicial arbiter of Canadian federalism.

In the parliamentary debate on the 1949 Amendment to the Supreme Court Act which made the Supreme Court Canada's ultimate court of review, it was this latter question which

¹ See, for instance, Louis-Philippe Pigeon, "The Meaning of Provincial Autonomy." 29 Canadian Bar Review (1951) 1135.



elicited the sharpest notes of concern from Quebec representatives. There was no significant support among exponents of provincial rights, either from Quebec or the other provinces, for the retention of Privy Council appeals. The official opposition's attempt to have the Supreme Court legally bound in the future by all of the Judicial Committee's past decisions was supported, mainly by English-speaking lawyers who claimed that they were carrying out a mandate of the Canadian Bar Association.¹ The point of dissent which was most often and most vigorously made concerned the lack of any provincial participation in the reconstruction of Canada's highest judicial organ. In the words of Mr. Léon Balcer:

The house is called upon to establish a final court to settle disputes which may arise between the central power and the provinces. We find it inconsistent that only one of the parties to a pact should be called, or rather that it should arrogate to itself the right to determine alone what tribunal will decide on its disputes with the other party.²

The only amendment sponsored by a Quebec M.P. was directed at the Supreme Court's qualifications for adjudicating

¹This was one of seven recommendations submitted by the Canadian Bar Association in relation to the abolition of appeals and was strongly endorsed by prominent Conservatives, including Mr. Drew. Canada. House of Commons Debates, 1949.

²Same, 661.



federal disputes. This was Wilfred La Croix's proposal that four of the Supreme Court justices be nominated by provincial governments and that the Supreme Court's decisions be unanimous whenever they affected provincial rights.¹

After 1949, distrust of the Supreme Court's objectivity in dealing with dominion-provincial conflicts has continued to be the most prominent objection made by Quebec representatives. The fact that the Supreme Court's judges are all appointed by the federal government and that their appointments are in no way subject to review by provincial governments lies at the base of this distrust. In 1953 Antonio Perrault made the point which has so often been returned to by Quebec spokesmen when he wrote:

La constitution canadienne est subjette à interprétation. Quels pouvoirs accord-t-~~elle~~ elle au parlement fédéral et aux parlements provinciaux? Ou se trouve la ligne séparative? S'il y a conflit, la cour suprême en décidera. Ses juges sont nommés par le gouvernement fédéral. En certains milieux, on en tire cette conclusion que les provinces ne sont pas suffisamment protégées.²

The fears of those who have taken up this argument were not put to rest by the fact that at least three of the nine members of the Supreme Court would have to come from the Province of Quebec, nor by Prime Minister St. Laurent's denial

¹ Same, 313-14. One of these four judges would have to be nominated by Quebec's government. Same, 493.

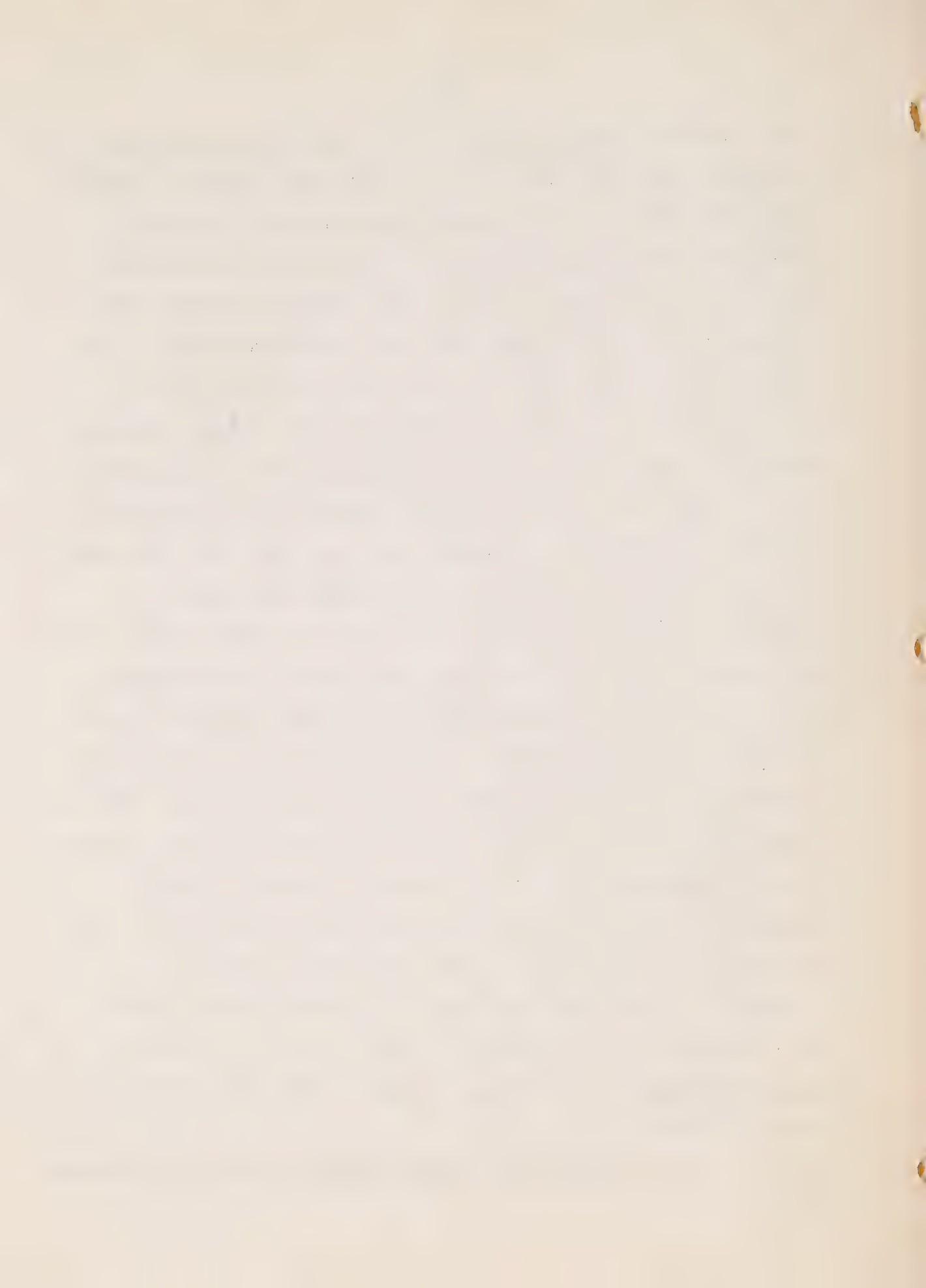
² "La cour suprême du Canada." Relations, Jan. 1953.



that the "substitution of one body of men for another body of men to pronounce upon conflicts which may arise in connection with provincial or minority rights...could have any effect."¹ Whatever support this viewpoint has found within Quebec has been sustained not by any tangible evidence that the members of the Supreme Court are biased in favour of the level of government which appointed them but by objection in principle to the constitutional arbitration by a tribunal which is organically part of the federal level of government.

This body of opinion which appears to be confined mainly to the Province of Quebec now poses the main challenge to the continued existence of the Supreme Court in its present form. The amendment of the Supreme Court in 1949 had the negative effect of abolishing all appeals from Canadian Courts to the Privy Council and the positive effect of completing the establishment of a unitary judicial structure with a federally controlled Supreme Court at its apex. The Judicial Committee, in validating the Act which established the Supreme Court's position at the top of Canada's judicial hierarchy affirmed that in doing so it was enabling Canada to enjoy the benefits of a nationally controlled, unitary system of courts. "It is", said Lord Jowitt, "a prime element in the self-government of the Dominion, that it should be able to secure through its own courts of justice that the law should

¹ Canada. House of Commons Debates, 1949 Second Session,
198.



be one and the same for all citizens."¹ The main question for the future is whether this ^{unitary} ~~scheme~~ of judicial organization with the Supreme Court at its head can continue to co-exist with the increasing emphasis in Canadian politics especially in Quebec, on provincial rights. As early as 1956, there were indications that Quebec opinion might insist on a negative answer to this question. The Quebec Royal Commission of Inquiry on Constitutional Problems stated that

...it is fundamentally repugnant to the federative principle that the destinies of the highest tribunal of a country be surrendered to the discretion of a single order of government.

And yet, as everyone knows, in Canada the Supreme Court depends on the central government alone from the threefold point of view of its existence, its jurisdiction and its personnel. It is to one or another of these three points that the main criticism of the Supreme Court of Canada are now being directed.²

The Tremblay Commission's Report contained the most severe criticism which has been directed at the Supreme Court's present scheme of organization since the abolition of Privy Council appeals in 1949. In the next chapter of this study we will drop the strictly historical account of the development of attitudes to the Supreme Court and turn to a more analytical treatment of the issues raised by the Tremblay Report and other sources of concern regarding the Supreme Court which have been expressed in recent years.

¹ A.-G. Ont. v. A.-G. Can. [1947] A.C. 154, 21.

² Province of Quebec. Report of the Royal Commission of Inquiry on Constitutional Problems. Vol. III, ch X, p. 282.



5. Evolution of the Supreme Court's Jurisdiction

Before turning to this analysis of contemporary issues, there is one other aspect of the Supreme Court's development which must be taken into account if its current position is to be fully understood: that is, the evolution of its jurisdiction. The statutory rules setting out the Court's jurisdiction and judicial interpretation of these rules determine the Kind of work the Court does and therefore the kind of influence it can have on Canada's legal system. Since the passage of the original Supreme Court Act in 1875 many changes have been made in the rules governing the Court's jurisdiction. Many of these have been of very minor importance and have been designed to overcome technical difficulties or to clarify ambiguities in the Supreme Court Act which have often been identified by the Court's bar or bench. But a number of amendments to the Supreme Court Act have had a more decisive impact on the Court's character and it is only with these that we shall concern ourselves here.

The most significant of these amendments have had to do with the Court's appellate jurisdiction -- the conditions under which appeals are admitted to it from the provincial courts. Three main periods of development can be distinguished with regard to the Court's appellate jurisdiction. The first period lasting from 1875 to 1920 was marked by a great variety in the appeal provisions for the different provinces and by considerable doubt as to the central



legislature's power to regulate appeals from provincial courts in all areas of law. In the second period, beginning with the Supreme Court Amendment Act of 1920, there was a great deal more uniformity in appeal provisions but the Supreme Court's power to grant leave to appeal was considerably less than that possessed by the highest court of final resort in the province. Finally in 1949, the Supreme Court Amendment Act of that year which abolished Privy Council appeals also reorganized the appeal provisions of the Act in a way which gave the Supreme Court much wider powers to determine the cases which it would hear. While it would be out of place here to present a detailed examination of each of these stages, a few remarks on each might indicate the significance of these developments for the general evolution of the Court as an important instrument of federal government.

The only way to characterize the rules governing the Supreme Court's jurisdiction in its earliest days is to say that they were a chaotic hodge-podge which caused great confusion to the Court's bar and bench. In 1904 E.R. Cameron, the Registrar of the Supreme Court noted the amount of litigation which this confusion had caused. In the decade from 1893 to 1903, there had been fifty motions to quash appeals in the Supreme Court for want of jurisdiction -- more than twice the number reported in the twenty years preceding. Cameron gave the following explanation for this situation:

The reasons for this is obvious when we examine critically the sections of the Act dealing with jurisdiction. We



find there a great lack of precision in the expression of the mind of parliament, and the sections are so ill-arranged that even after a very careful and minute examination it is often difficult to determine whether a case is appealable or not.¹

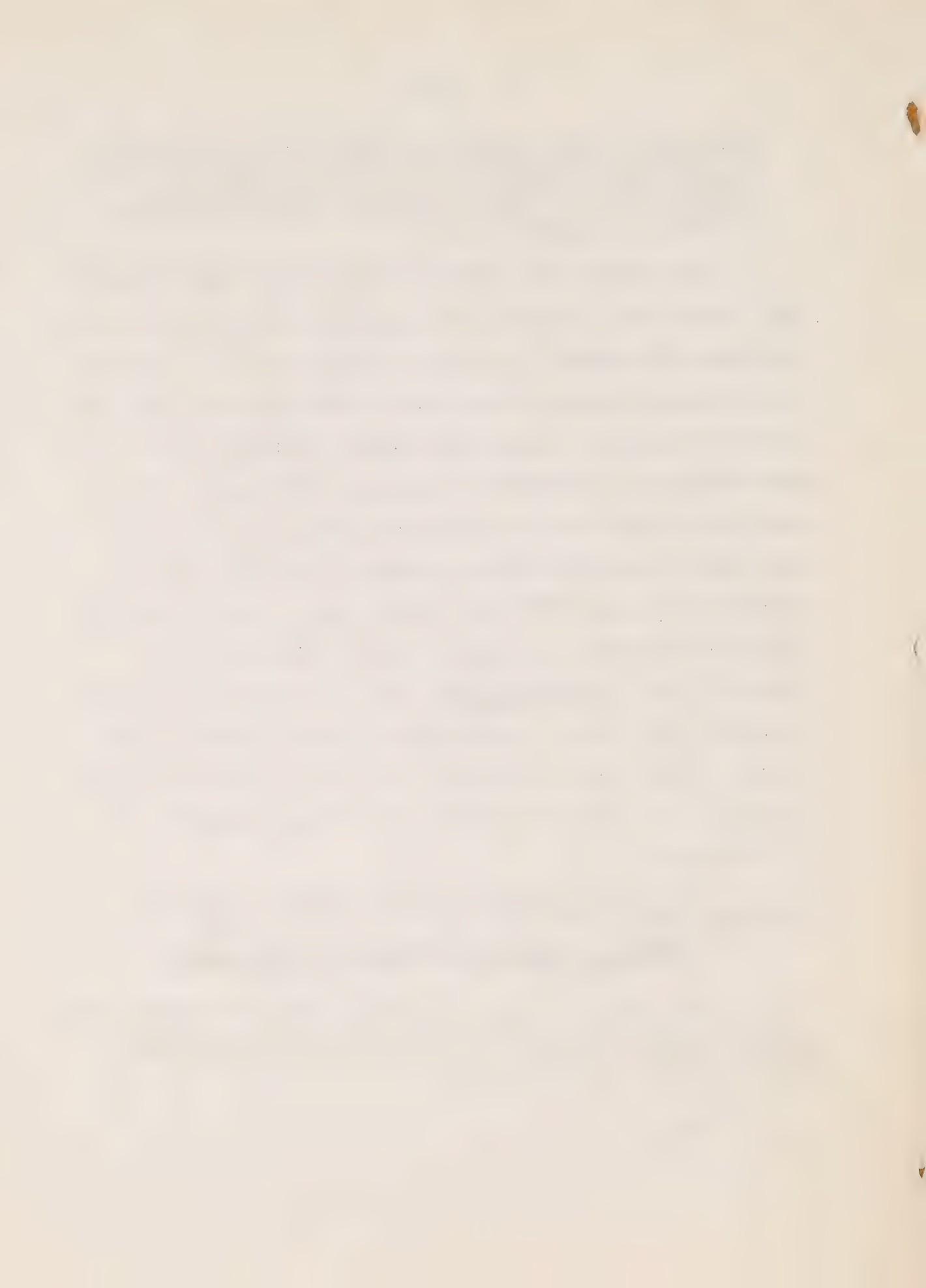
But besides the confusion caused by sloppy draughts-
ship, there were, as Professor Laskin has pointed out various "sectional interests"² at work which did much to account for the variegated nature of the Court's jurisdiction. From the outset the right of appeal from Quebec was subject to a \$2000 monetary requirement.³ Later in 1897 Ontario, too, which like Quebec had its own Court of Appeal was able to have Ontario appeals limited although there the monetary requirement was only \$1000.⁴ On the other hand, in the other provinces which had no Court of Appeal and in which the Superior Court, sitting en banc, was the highest provincial tribunal, there was no inclination to limit appeals to the Supreme Court. On the contrary, in those provinces the right of appeal was virtually unlimited from final judgments of

¹ "Proposed Amendments to the Supreme Court Act." 3 Canadian Law Review (1904) 377 and 403, at p. 382.

² Above, page 68, footnote 1, at p 1049.

³ But note also that in 1893 the Supreme Court Act was amended so that the Supreme Court's jurisdiction in Quebec appeals became as nearly as possible equal to that of the Privy Council. 56 Vic., ch. 29.

⁴ 60-61 Vic., ch. 34.



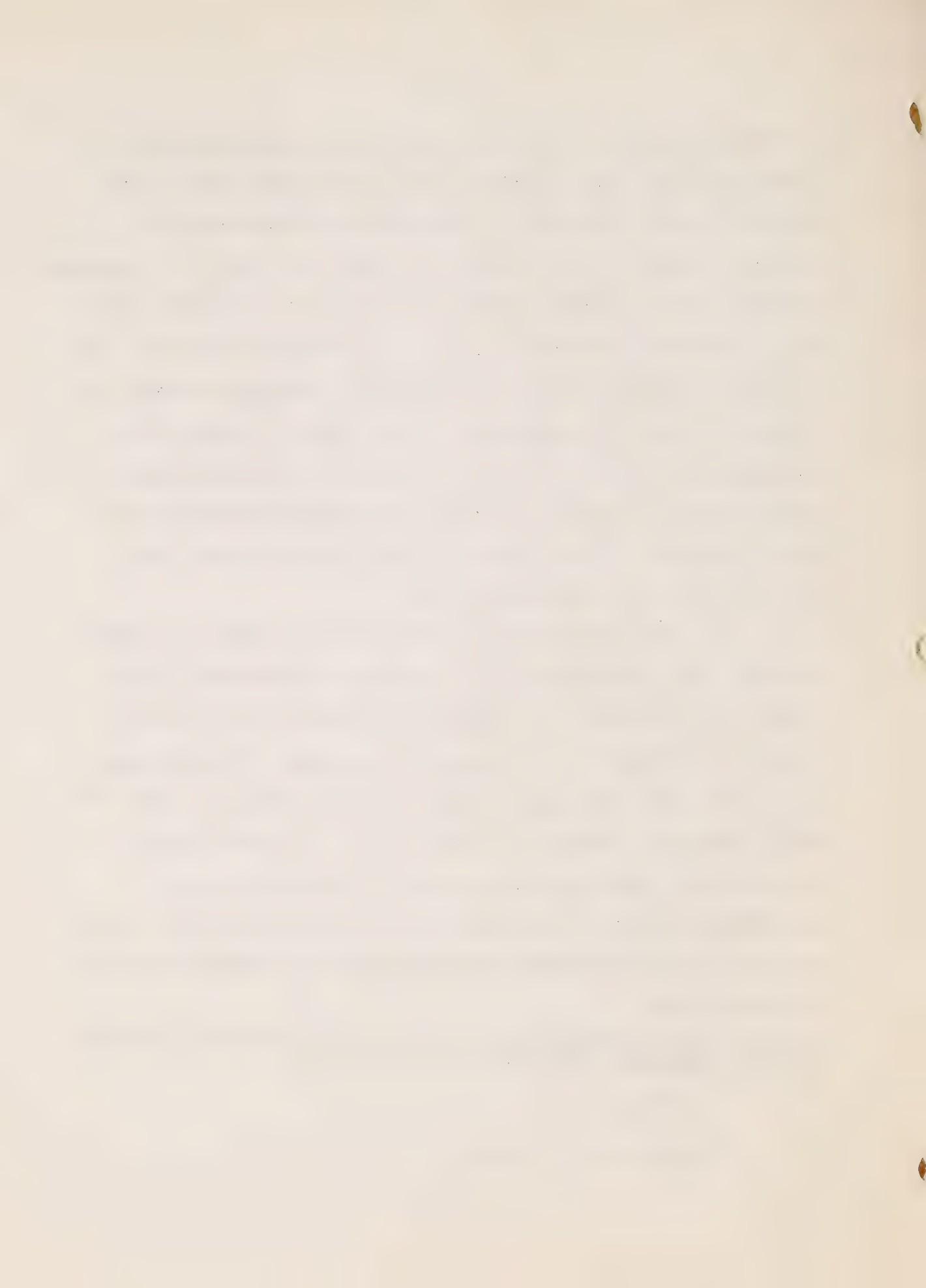
the highest court of last resort in cases originating in a Superior Court and in certain other cases there was a wide right of appeal where the action did not originate in a Superior Court.¹ For example, in 1889, as a result of pressure from British Columbia, provision was made for appeals from that province's assessment boards to the Supreme Court.² Not only did this mixture of jurisdictional provisions result in a complete lack of uniformity in the right of appeal in the different provinces, but also the lack of any significant restrictions on appeals from the Maritime and Western Provinces meant that the Court was often forced to deal with matters of a very trifling nature.

In 1920 many of these anomalies were removed. The Supreme Court Amendment Act of that year introduced a high degree of uniformity into the rules governing the Court's appellate jurisdiction.³ Appeals, de plano, or as of right, in all the provinces were subjected to the monetary limit of \$2000 which had previously applied only to Quebec appeals. In all other cases appeals were to be by special leave of the highest court of last resort in the province. The Minister of Justice in introducing the legislation explained that

¹For a discussion of this situation see E.R. Cameron, above, page 102, footnote 1, pp. 412-13.

²52 Vic., ch. 37.

³10-11 Geo. V, ch. 32.

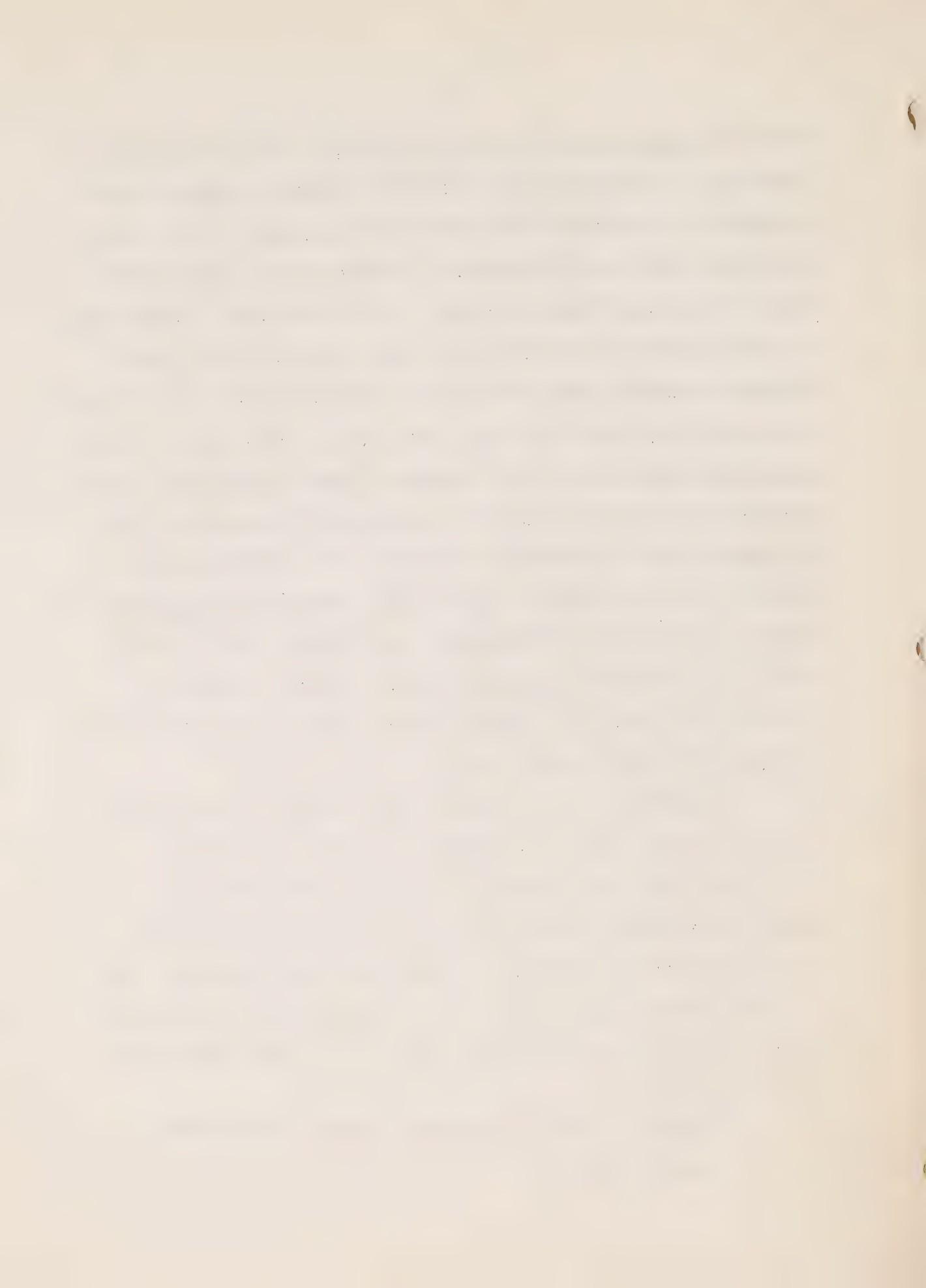


"the Bill substantially involves giving to the provincial courts in all the provinces exclusive rights to grant leave to appeal in cases not now appealable de plano."¹ He later indicated that his willingness to surrender so much control over the Supreme Court's docket to the provincial courts was in part based on his conviction that the provincial legislatures "control appeals" at least in provincial law matters.² The result was that following 1920, while there was now considerable uniformity in the Supreme Court's appellate jurisdiction, the Supreme Court had less power in granting leave to appeal than the provincial courts. The Supreme Court's power to admit an appeal in cases not appealable de plano was limited to cases involving money or property over a specified value and constitutional issues. Furthermore, the Supreme Court could not grant leave unless it had first been refused by the provincial court.

In 1949, the most significant change in the jurisdiction provisions of the Supreme Court Act was effected in s.41 which gave the Supreme Court an independent power of admitting appeals. According to this clause the Supreme Court, subject to some minor qualifications, can grant leave to appeal "from any final or other judgment of the highest court of final resort in a province, or a judge thereof, in

¹ Canada. House of Commons Debates, 1920, 2004.

² Same, 2389.



which judgment can be had in the particular case sought to be appealed to the Supreme Court, whether or not leave to appeal to the Supreme Court has been refused by another court.¹ This clause did not take away from provincial courts their power to grant special leave to appeal to the Supreme Court. But in effect it granted to the Supreme Court an overlapping power to admit appeals, a power which made it far more possible for the Supreme Court itself to determine the legal issues with which it would deal. Summarizing the wide powers of admitting appeals now possessed by the Court Professor Laskin has written that:

By and large, it is open to the Court to give symmetry and uniformity to Canadian law, regardless of the terms of provincial statutes governing appeals or review in the provincial courts. For the Supreme Court... is not confined to the admission of appeals from final judgments of the highest court in the provincial judicial hierarchy: it is within the Court's power to hear an appeal from any judgment (subject to the qualifications mentioned) of the highest provincial court of final resort in which judgment can be had in a particular case.²

Of course, mere possession of a power does not determine how it will be used. Since 1949, the Court in a number of cases in which dissatisfied provincial litigants have petitioned the Court for leave to appeal has certainly not manifested an overly aggressive desire to review the judgments of provincial courts. It has on the whole developed

¹Supreme Court Act, R.S.C. 1952, c. 259, s. 41. (italics added).

²Above, page 68, footnote 1, p. 1052.



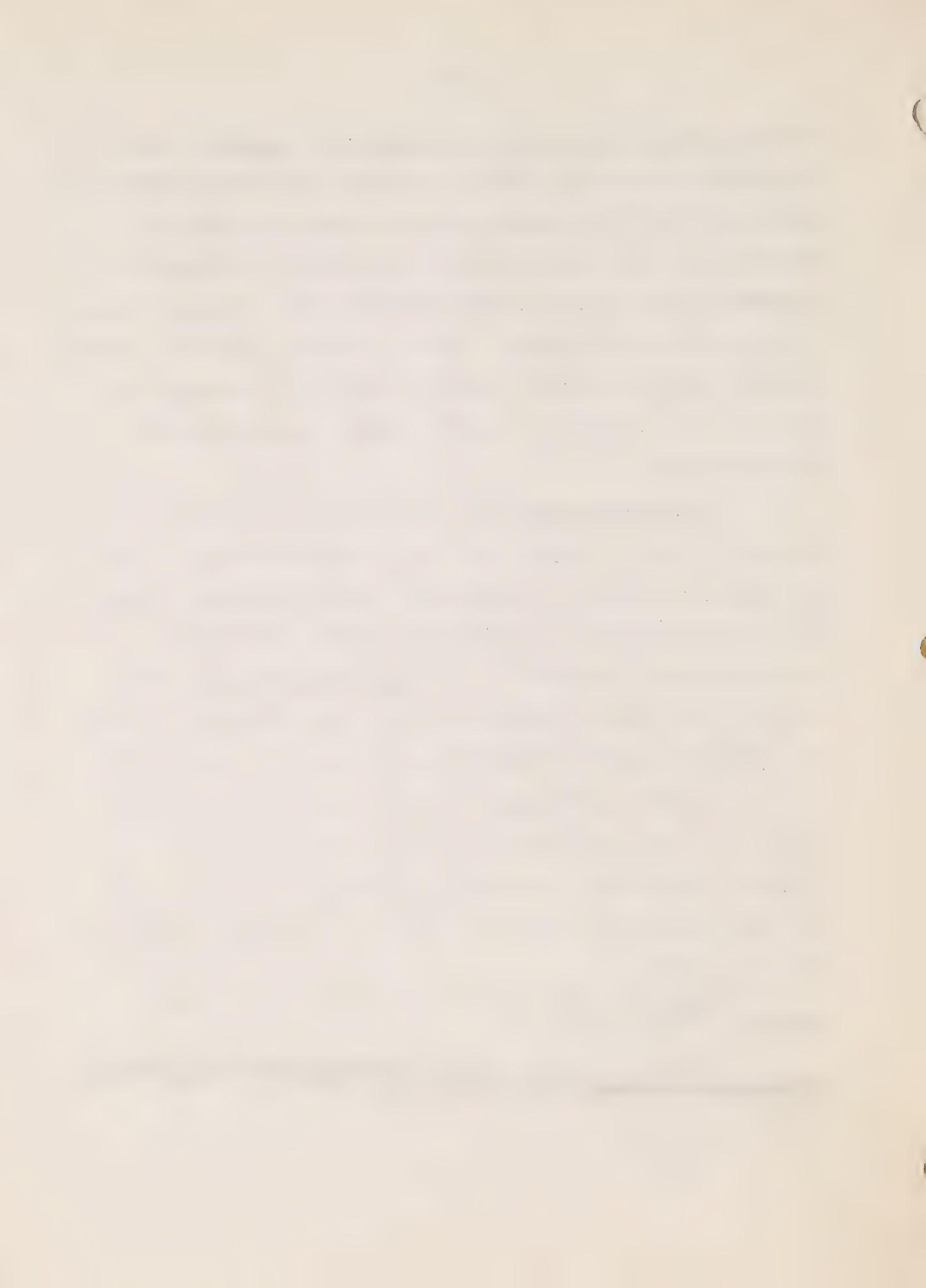
a very cautious policy on the admission of appeals. One of the first tests of its interpretation of its powers under s.41, indicated that "the Supreme Court is likely to insist on exhaustion of any local remedies available to challenge a judgment which is not directly appealable."¹ A recent study of the Court's application of s.41 concludes that "the Court's attitude indicated by the manner in which it has exercised its power to admit appeals would appear to be narrow and restrictive."²

It might be well before concluding this historical section to give a capsule view of the Supreme Court's overall jurisdiction as it has emerged from 75 years of development. The primary feature of the Supreme Court's jurisdiction is unchanged; now, as in 1875, it is primarily an appellate court. Its original jurisdiction has been reduced from what it originally was mainly by virtue of the transfer, in 1887, of its original jurisdiction in cases involving the federal Crown to a separate Exchequer Court.³ Now the Court's original jurisdiction is restricted essentially to two areas: its individual judges can hear requests for habeus corpus in

¹ Same, p. 1053. The case referred to was Major Beauport [1951] S.C.R. 60.

² John J. Cavarzan, Civil Liberties and The Supreme Court: The Image and the Institution (Master of Laws Thesis, Osgoode Hall Law School, 1965) p. 57.

³ 50-51 Vic., ch. 16.



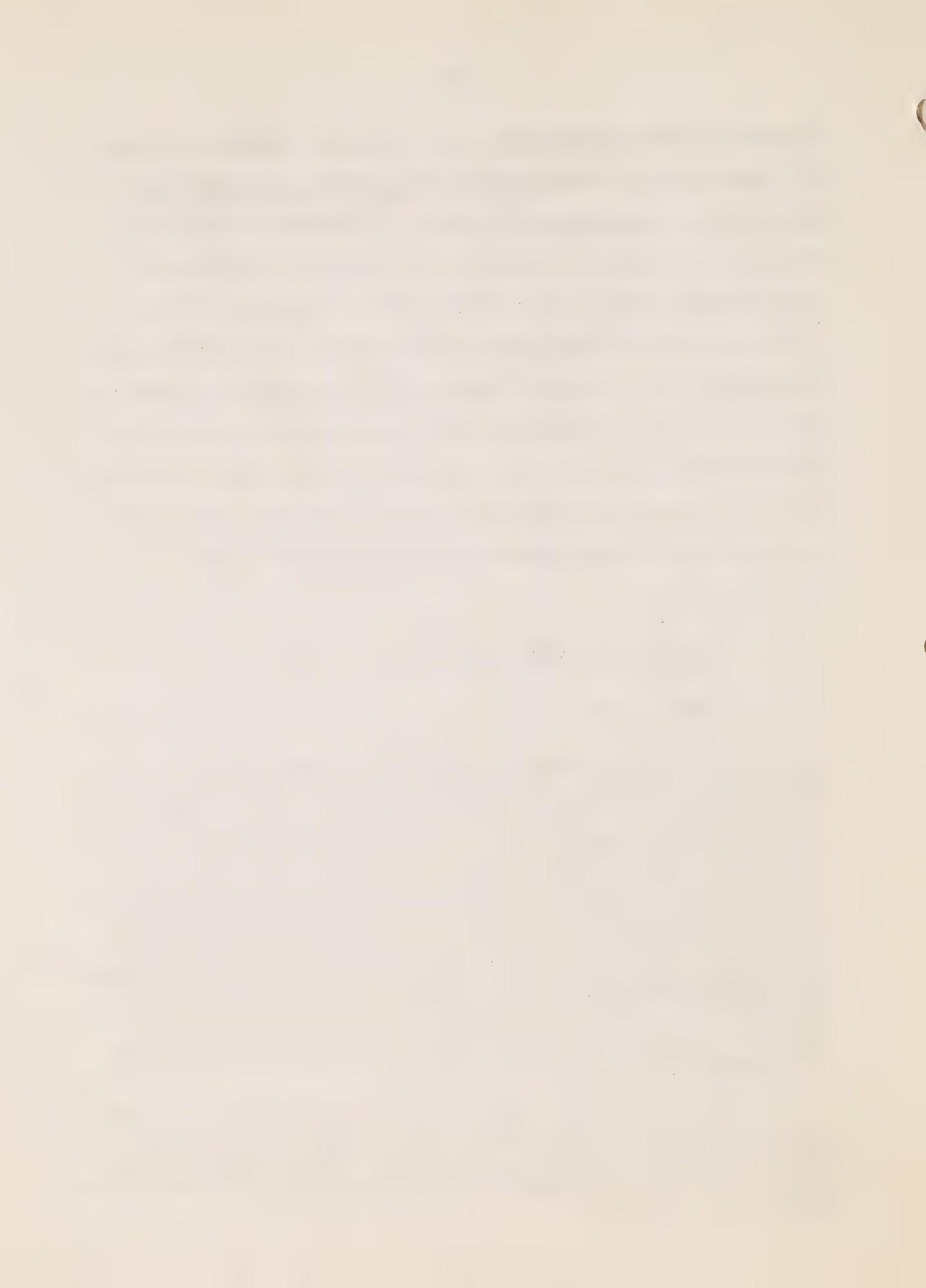
connection with commitments under federal criminal law¹ and the Court may be asked to give its opinion on questions, mainly of a constitutional nature, submitted to it by the Governor in Council.² The latter element in the Court's jurisdiction represents a considerable expansion of the Court's role in giving "advisory" opinions on Constitutional questions. The original doubts as to Parliament's power to vest this kind of responsibility in the Supreme Court have been removed,³ and over the years the federal government has shown an increasing tendency to call upon the Supreme Court to settle questions concerning the division of powers.⁴

¹ Above, page 105, footnote, I , s.57.

² Same, s.55.

³ The Privy Council's decision in A.-G. Ont. v. A.-G. Can. [1912] A.C. 571 established the Dominion Parliament's power to authorize the reference to the Supreme Court of any question of law, or fact. Prior to this in 1891, provision had been made for the Court to give reasons for their conclusions in reference cases. (54-5 Vic., ch. 25). In theory the Court's decisions in reference cases are only advisory, but in practice they seem to carry the same weight as ordinary judgments. The Supreme Court has said that "in a contested case where the same questions would arise, they would no doubt be followed." Reference Re Validity of Wartime Leasehold Regulations [1950] 2 D.L.R.1, at p. 3. Note also that in 1922, at the request of the provinces provision was made for an appeal to the Supreme Court from the Supreme Court of a province in cases involving reference made under a provincial Act. 12-13 Geo. V, c. 48.

⁴ Up to 1949 the federal government initiated 41 such reference cases in the Supreme Court. Over half of these reference cases were made after 1930. Since 1949 the federal government has submitted constitutional questions to the Court on 8 occasions.



But the overwhelming proportion of the Court's business concerns the review of other Courts' decisions in all areas of provincial and federal law.¹ Some of this appellate jurisdiction is established in particular statutes such as the Bankruptcy Act, Dominion Controverted Elections Act, Exchequer Court Act, National Defence Act, Railway Act and Winding-Up Act.² But the main provisions for civil and criminal appeals are contained in the Supreme Court Act and the Criminal Code.

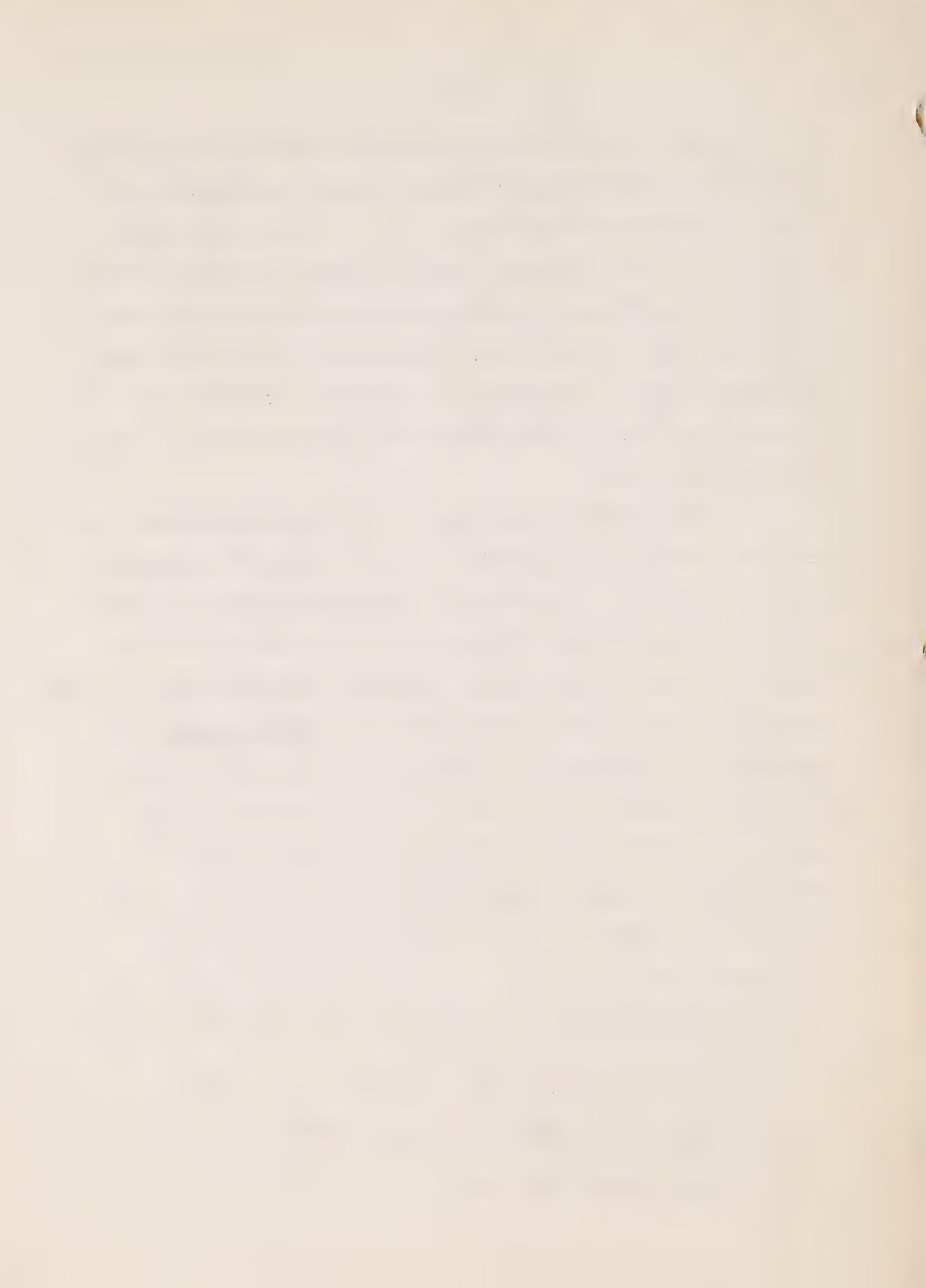
Taking civil cases first, as we have seen, there are now three main routes whereby a case may reach the Supreme Courts. First, a litigant has an automatic right of appeal from the highest court of final resort in a province if the amount in controversy exceeds a certain monetary value or if ~~the~~ judgment appealed from was pronounced in habeus corpus or mandamus proceedings.³ In 1956 the jurisdictional amount was raised to \$10,000.⁴ This is the commonest source of appeals and it is open to the obvious objection that "it is the issues arising, not the amount of money or form of procedure, that renders a case of sufficient moment to be

¹ For instance, of the Court's 1031 reported decisions from 1949 to 1964, 12 were not appeal cases.

² See above, page 68, footnote 1, p. 1050.

³ Above, page 105, footnote 1, s.36.

⁴ 1956 (Can.) c.48, s.2.



determined by the highest tribunal."¹ If a litigant has no appeal as of right, he can apply either to the highest court of final resort in the province for leave to appeal to the Supreme Court or he can ask the Supreme Court itself to grant leave to appeal.² The pattern would appear to be to make application first to the provincial court and then if this application is turned down petition the Supreme Court. This at least gives the litigant two opportunities to have his case heard in the Supreme Court. Although, it should be noted that the Supreme Court has refused to review cases in which the provincial court has granted leave to appeal.³ Still this is a pretty rare occurrence, so that in practice the provincial courts continue to have a very extensive influence on the composition of the Supreme Court's docket. In deciding whether or not to grant appeals the courts have professed to be guided by the criterion of "matters of public

2.

S.39 of the Supreme Court Act also provides for per saltum appeals from lower courts to the Supreme Court in a restricted category of cases. Per Saltum appeals require leave of the highest court of last resort in the province. See

3.

See comments by Kerwin, C.J., at p. 286 in Switman v. Elbling and A.-G. Quebec [1957] S.C.R. 285.

F. Glen How, "The Too Limited Jurisdiction of the Supreme Court of Canada," 25 Canadian Bar Review (1947) 573, at p. 575



interest",¹ but this, needless to say is a rather ambiguous formula.

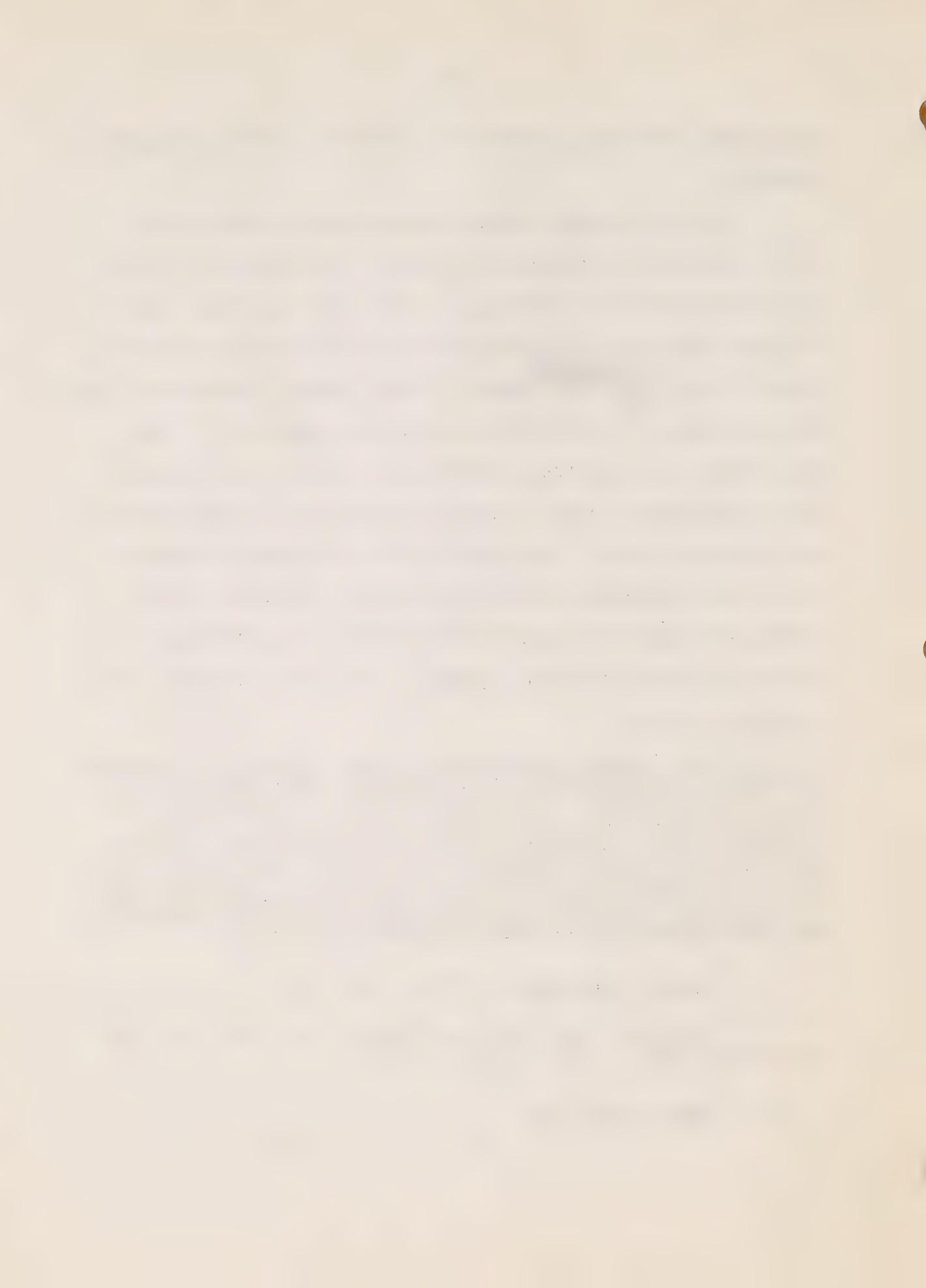
On the criminal side, appeals may be taken to the Court in summary conviction offences, only after the Court has granted leave.² However, a person who has been sentenced to death and whose conviction is affirmed by the provincial court of appeal ~~to the~~ ^{may appeal} Supreme Court, without requesting leave, on any issue of law or fact or mixed law and fact.³ Also in capital cases, if the acquittal of a person is set aside by the provincial appeal court, an appeal as of right lies to the Supreme Court.⁴ With non-capital indictable offences, where the conviction is affirmed by the provincial appeal court, the right to appeal without leave is restricted to a question of law on which a judge of the court of appeal has

¹ The classic formulation of the criteria for deciding whether a case should go to the Supreme Court was given by Mr. Justice Nesbitt of the Supreme Court of Canada in 1904: "where, however, the case involves matter (sic) of public interest or some important question of law or the construction of Imperial or Dominion statutes or a conflict of provincial or Dominion authority or questions of law applicable to the whole Dominion, leave may well be granted" Lake Erie and Detroit Ry. Co. v. Marsh (1905) 35 S.C.R. 197.

² Above, page 105, footnote 1 s.41(3).

³ Criminal Code, 1953-54 (Can.) c.51, s.597 A(a) (as enacted by 1960-1 (Can.) c.44, s.11).

⁴ Same, s.597(A)b.



dissented.¹ While the provisions concerning criminal appeals have caused some doubts as to their correct interpretation, the Supreme Court itself has had the exclusive power of resolving these problems and clarifying the Court's jurisdiction in this area.

In concluding this section of our study two general points should be made about the evolution of the Supreme Court's jurisdiction: first, this evolution has gone on without receiving or being subject to any constitutional definitions, and secondly the development has potentially entailed a decidedly centralizing or unifying effect on Canadian federalism. The one constitutional point which has been of crucial importance in enabling the federal Parliament to adjust and expand the Court's appellate jurisdiction is that section 101 of the B.N.A. Act gives Parliament an exclusive power to regulate appeals to the Supreme Court. Furthermore the Privy Council's decision in the Crown Grain Co.² case and again in the 1947 reference case on the Supreme Court Act, confirmed that this power precluded any power of the provincial legislatures to curtail appeals from provincial courts, even in areas of law subject to provincial legislative power. Thus the power to determine the basic structure of the Canadian judicial system is undivided and

¹ Same, s.597(1).

² Above, page 24, footnote 2.

rests exclusively with the central legislature. Further, in exercising this power the federal parliament has not been subject to any significant constitutional rules.¹

What this means of course is that Canada's judicial system is essentially unitary, not federal. In terms of its potential power to introduce uniformity into the country's legal system, the Canadian Supreme Court is closer to the English House of Lords than the American Supreme Court. Of course, the Supreme Court must recognize local differences when there are statutory variations in the laws of the provinces: but even here it is by no means bound to follow provincial court interpretations of provincial statutes. Whereas in the United States where at least since 1938 the Supreme Court has held that "there is no federal general common law"² and in cases involving diversity of citizenship it must be guided in applying state law by the decisions of state courts, in Canada the Supreme Court is "in a much stronger position to develop a unified common law".³ In a word the Supreme

¹The main limitation is the provinces' power to regulate civil procedure under Section 92 (14) of the B.N.A. Act.

²Eire Rr'd Co. v Tompkins, 304 U.S. 64 (1938), at p. 78. For a discussion of the ramifications of this case and a comparison of the relationship between local and federal laws in various federal judicial systems, see W. T. Wagner, The Federal States and their Judiciary (Mouton & Co. 1959), ch. 9.

³Bora Laskin, above, page 68, footnote 15, p. 1053.

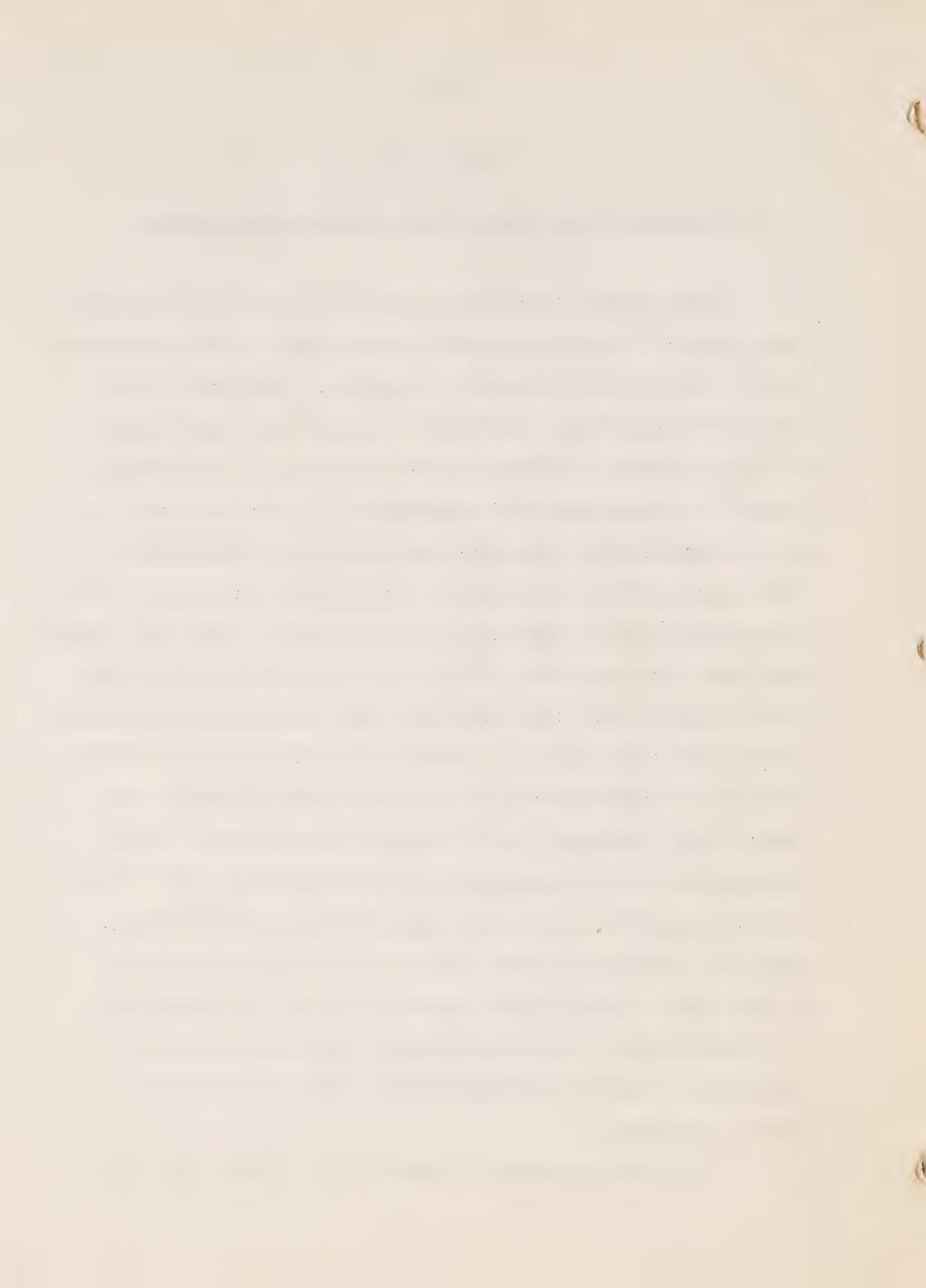
Court of Canada has emerged with far more of the characteristics of a general, national court of ultimate appeals such as exists in Great Britain than those of a specialized guardian of the federal constitution and federal law such as exists in the United States.

Chapter II

The Supreme Court Since 1949: Contemporary Issues

The Supreme Court's elevation in 1949 to a position of true judicial supremacy did not either then or later make the Court a major focus of public attention. Canadians traditionally have not been inclined to regard the organization of their country's judicial system as being as influential an element in their system of government -- or as malleable -- as its legislative, executive and political institutions. This is generally the result of conventional views as to the independence of the judiciary and its duty to interpret, rather than make the law, plus the fact, in the case of the Supreme Court, that neither the Canadian constitution nor its judicial system impose on Canada's ultimate appellate court as distinctive or as consequential a set of responsibilities as are imposed, for instance, on the United States Supreme Court. Nevertheless, the attainment of judicial autonomy did intensify the interest of a small, although potentially influential, group of Canadians in some of the basic questions relating to the Court's role in the Canadian system of government. The Court's actual performance since 1949 has increased this interest, as has the growing concern with bicultural and federal problems.

It is the purpose of chapters III, IV and V of this

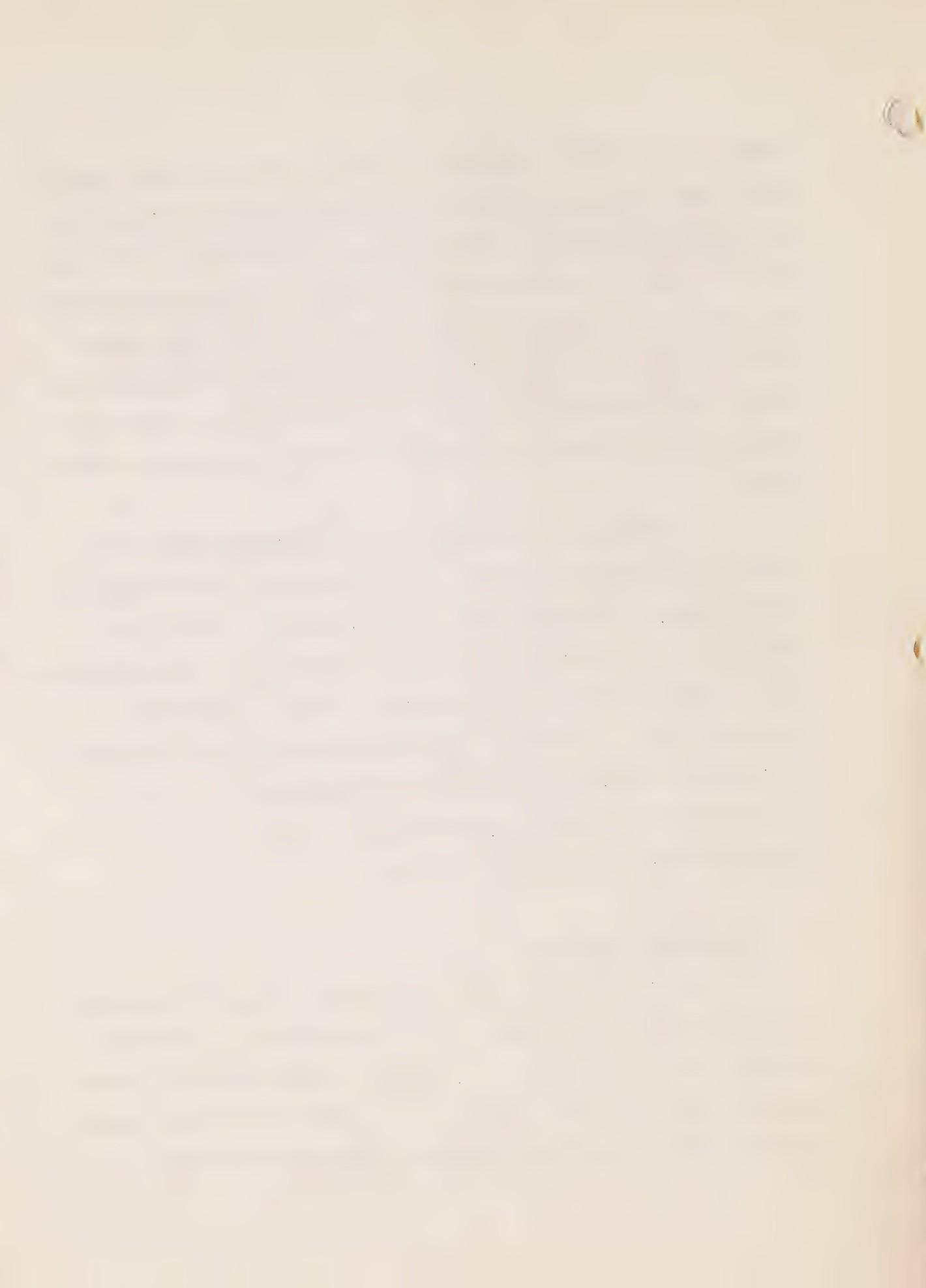


study to set down in some detail those aspects of the Court's work since 1949 which have an immediate bearing on bicultural and bilingual issues. However, before proceeding to this part of the study it is worthwhile describing the principal forms of criticism and debate which have emerged in recent years in relation to the role of the Supreme Court. An analysis of these viewpoints should serve as a useful guide to the relevancy of the findings set out in the latter sections of this study.

For purposes of analysis three distinct kinds of concern can be distinguished: the federalist, the bilingual and bicultural questions which are of special concern to Quebec and the general interest in the Supreme Court's capacity for national judicial statesmanship. While no doubt in practice there is considerable overlapping of these concerns, it seems worthwhile to consider them separately for they raise different kinds of questions for research and point to different kinds of possible reform.

1. Federalist Concerns

From the point of view of Canada's federal structure, the chief point of interest in the operations of a federal supreme court is its role of arbiter or umpire of the federal system. Advocates of 'classical' or 'pure' federalism argue that the institution which settles disputes between the



constituent parts of the federal state and the national government should not, in principle, be subject to the exclusive control of either level of government. In the words of K.G. Wheare, one of the foremost expositors of the principles of federal government, "what is essential for federal government is that some impartial body, independent of general and regional governments, should decide upon the meaning of the division of powers".¹ As has already been noted above, one of the primary points of criticism raised by Quebec's Royal Commission on Constitutional Problems was the contention that this principle was violated by the existing organization of the Supreme Court of Canada.

While this particular point of criticism might be taken up by any thorough-going adherent of 'pure' federalism, it would appear that since 1949 only Quebec spokesmen have been prominent in expressing this argument. Although it may be that ^{the} recent resistance of a number of provincial governments to submitting to the Supreme Court the question of whether the provinces or the dominion have jurisdiction over off-shore mineral rights is, in part, based on the same kind of distrust voiced by Quebec representatives.

The essential element in this distrust is the central government's control over the appointment and dismissal of

¹ Federal Government (3rd ed. Oxford Univ. Press. 1955)
p. 66.



Supreme Court judges. The inference which sustains this distrust is that judges who are appointed by the federal government and can be removed by the federal legislature, are apt to favour the federal level of government in federal-provincial disputes.¹ Presumably, although this is not spelt out by those who adopt this argument, the centralist bias would result from the kind of men a federal government is most likely to choose in making Supreme Court appointments, or else from the influence which the federal level of government might have on Supreme Court justices after their appointments. The latter suspicion would have to be based primarily on the informal rather than formal influence which federal agencies might exercise, for Supreme Court Judges, once appointed, hold office on good behavior and can be removed only by the Governor

¹The following extract from the submission made by the Presse Etudiante Nationale to the Royal Commission on Bilingualism and Biculturalism is fairly typical of the popular expression of this viewpoint: "Dans les matières qui concernent les pouvoirs provinciaux, l'accord des gouvernements provinciaux est requis pour amender notre constitution. Toutefois, lorsque, s'il y a impossibilité totale d'intente entre les gouvernements fédéral et provinciaux, le cas sera référé à la Cour Suprême....Cependant, les juges de la plus haute Cour de notre pays sont nommés par le fédéral, exclusivement et sans ratification par les provinces....Les pouvoirs déjà acquis par les provinces sont donc, dans une certaine mesure, soumis, quant à leur existence, à une autorité hostile, en principe" (Submission 240-271, pp. 48-9, No. 172.)



General on address of the Senate and House of Commons.¹ Still, this does mean that the federal parliament possesses the exclusive power to remove Supreme Court Judges. Also, there is the possibility that the conditions of tenure, because they are provided for in federal legislation, rather than in the constitution, could be altered unilaterally by the federal legislature. Besides the rather remote possibility of the federal government influencing the Supreme Court through the exercise of these legal powers, there is the larger possibility of the judges' outlook being shaped by the federal environment in which they work and live. But this kind of influence could not be overcome by simply altering the method of appointing Supreme Court judges.

It should be noted that provincial opposition to the central government's control over Supreme Court appointments and dismissals is not based on actual manifestations of the centralist bias which it is alleged such control might produce in the constitutional decisions of the Supreme Court. Indeed, K.C. Wheare, the federalist expert, whose opinion has been cited here and is so often cited as grounds for the federalist critique of the Canadian Supreme Court, after pointing out that "in most federal governments the settlements of disputes about the meaning of the division of powers

¹ Above, page 105, footnote 2. s.9(1). S.9(2) provides that judges automatically retire on reaching age 75.



is confided to a body appointed and dismissable by the central government" goes on to observe that "in spite of the formal dependence of the supreme courts on the executive and legislature of the general government, they have exhibited a considerable impartiality in the exercise of their function as interpreters of the division of powers."¹ Whether or not Wheare's generalization holds true for Canada, one does not find that recent provincial critiques of the inherent centralist bias of the Supreme Court turn on real indications of this in the Court's decisions.

When one actually examines the Supreme Court's record in constitutional adjudication, it is interesting to find that in the one period when the Supreme Court was most vulnerable to the charge of favouring the federal government, this complaint was not a significant ingredient of public discontent with the Court. This was, of course, in the Court's earliest years when it had not yet become thoroughly controlled by Privy Council precedents, and in one or two instances, as we pointed out earlier, demonstrated a concern for upholding federal power, particularly in the field of trade and commerce. Following these early decisions and up until 1949, the Supreme Court's subordination to the Privy Council was such that it could scarcely be accused of having taken an initiative on the basic issues of constitutional law

¹ Above, page 116, footnote 1, p. 63.



that was clearly centralist or provincial. There were, it is true, occasional instances in which the Supreme Court, or at least some of its members, showed an independence of the Privy Council's modes of reasoning, but in their disagreements, the Canadian judges were as often as not, on the provincial rather than the federal side.¹ What was surely more important than

¹ For an extensive analysis of the Supreme Court's captivity to Privy Council precedents in constitutional law, see F.E. Labrie, "Canadian Constitutional Interpretation and Legislative Review," 8 University of Toronto Law Journal (1949-50) 298.

Chief Justice Anglin was perhaps the best example of a Supreme Court Judge who differed openly with the Privy Council's interpretation of the B.N.A. Act and, in so doing, took a position more favourable to federal legislative power. See his opinion in In Re The Board of Commerce Act and The Combines and Fair Prices Act, 1919, (1920) 60 S.C.R. 456, at p. 467 and his attack on Viscount Haldane's reasoning in the Spider case in The King v. Eastern Terminal Elevator Co. [1925] S.C.R. 434, at p. 438.

A strictly quantitative analysis makes it difficult to argue that the Supreme Court has been inherently pro-Dominion. In 13 cases concerning the division of powers the Privy Council reversed the Supreme Court's decision. In 6 of these the Privy Council decision granted the provinces' legislative power which had been denied by the Supreme Court (the Manitoba Public Schools Act case, 1892; the Fiscal Prohibition case 1896; the Bonanza Creek case, 1916, and 3 cases involving provincial tax measures - The Fairbanks Estate, 1927; the Atlantic Smoke Shops case, 1943 and A.-G. B.C. v. Esquimalt & Nanaimo Ry. Co. 1949). On the other hand, in 4 others the Privy Council invalidated provincial laws declared valid by the Supreme Court (Cotton v The King, 1913; Ottawa Separate Schools Trustees v Ottawa Corp, 1916; Great West Saddlery v the King, 1921 and the Winner case of 1954). In the remaining 3, Supreme Court decisions denying the Dominion jurisdiction were overruled by the Privy Council (The Aeronautics Reference, 1931, Graft v. Dunphy, 1933 and one part of the Dominion Trade and Industry Commission Act in the 'New Deal' References of 1936-7).

any of the concrete differences between the tenor of the Supreme Court's constitutional decisions and those of the Privy Council in shaping popular attitudes was simply the fact that the Privy Council, as the supreme arbiter of the Canadian constitution was independent of both the provincial and federal governments. When you add to this the generally acknowledged tendency of the Privy Council's critical decisions to strengthen provincial powers, it is not surprising that provincial spokesmen, after 1949, might suspect that a final constitutional arbiter subject to exclusive federal control would tend to move in the opposite direction.

Since 1949, the Supreme Court has not embarked on a revolutionary departure from the Privy Council's approach to the division of powers. It is true that in the Johannesson¹ case a majority of the Court supported a less restrictive view of the federal legislature's general power than that developed by the Privy Council, and again the Court's judgments in both the Ontario Farm Products Marketing Act Reference², and the Murphy³ case, pointed to a larger conception of the federal trade and commerce power⁴. But, on the other hand, in a number

¹[1952] 1 S.C.R. 272.

²[1957] S.C.R. 198.

³[1958] S.C.R. 626.

⁴For a survey of the Supreme Court's decisions on the division of powers since 1949 see Peter H. Russell, "The Supreme Court's Interpretation of the Constitution Since 1949", in Paul Fox (ed.) Politics: Canada (McGraw Hill of Canada, 1962).

of cases challenging provincial statutes, the Court was willing to uphold the provincial legislation and, in effect, carve out a larger area in which the provinces could act concurrently with the dominion.¹ It may be true that in the post 1949 period the provincial legislatures have certainly had more of their Acts invalidated by the Supreme Court than has the federal parliament. But this is ^{more} likely a reflection of the greater tendency of contemporary provincial regimes to venture into new spheres of activity ~~than~~ a reflection of a federal bias among the members of the Supreme Court. In any event, it is not the phenomenon which appears to have provoked federalist objections, especially in Quebec, to the Supreme Court.

Those objections, as we have stressed, are based primarily on the principle that federal equity demands either the supreme constitutional tribunal's complete independence of both levels of government, as was the case with the Privy Council, or else its bilateral dependence on both levels. Expressed not as a sense of distrust of the existing Court, but more as a positive proposal for strengthening the provinces' and particularly Quebec's confidence in the constitutional decisions of a Supreme Court, this position insists

¹ For a discussion of some of these decisions, see W.R. Lederman, "The Concurrent Operation of Federal and Provincial Laws in Canada" 9 McGill Law Journal (1963) 185.

above all on provincial participation in the appointment of Supreme Court judges. A number of proposals have been made for implementing this principle. One approach is to have the provincial governments directly appoint or nominate some of the judges of the Supreme Court or of a special Constitutional Court.¹ Proponents of this scheme have usually contemplated that for this purpose the provinces be grouped in accordance with the regional divisions of the Senate. Of course, those in Quebec who have recently been pressing for a more dualistic constitution... for Canada would go much further than this and insist that the part of Canada representing the French culture enjoy equal rights with the English section in selecting the members of the tribunal that interprets the constitutional compact.² But this position goes considerably beyond federalist concerns for it entails a binational rather than a federal approach to institutional reform. A more indirect way of involving provincial representatives in the process of

¹ See, for instance, the recommendations of Quebec's Royal Commission on Constitutional Problems, above, page , footnote ; and by Antonio Perrault, above, page 97 , footnote .

² There is apparently some support for this position outside of Quebec. See submissions of the Board of Directors of the Students Christian Movement of Canada. (750-485; No. 41) and of the Communist Party of Canada (750-430, No. 159) to the Royal Commission on Bilingualism and Biculturalism.



making Supreme Court appointments is to have one of the national institutions, most likely a reconstructed Senate, which is especially designed to represent provincial interests, have some power of ratification over Supreme Court appointments. Those federal states which place some restrictions on the central government's control over appointments to the highest constitutional court, namely the United States and West Germany, use this type of mechanism.¹ Short of either of these approaches, the other remedy which could be regarded as a minimal way of reducing provincial suspicions of federal control over the Supreme Court would be to inscribe some of the key clauses in the Supreme Court Act governing the appointment and tenure of judges and possibly the jurisdiction of the court in articles

¹In the United States, the Senate which gives equal representation to each State must consent to the President's appointments to the Supreme Court. In West Germany, half of the 24 members of the Federal Constitutional Court are elected by the federal parliament (Bundestag) and half by the federal council (Bundesrat) which gives direct representation to the state governments. For detailed comparative studies of judicial structures of federal states, see Robert R. Bowie and Carl Friedrich (eds.), Studies in Federation (Little Brown and Co. 1954). Study No. 3 in this volume compares Australia, Canada, Germany, Switzerland and the United States. Also W.J. Wagner, The Federal States and Their Judiciary (Merton & Co. 1959) compares federal judicial organizations in the United States, Canada, Australia, Switzerland, Argentina, Brazil and Mexico.

of the written Constitution not subject to unilateral amendment by the federal legislature. This extension of constitutional status to the crucial qualities of the Court might include the clause in the Supreme Court Act that requires that at least one-third of the nine Supreme Court judges be from Quebec.¹

It is not our intention here to follow through all the implications of carrying out any of these proposals. Nor in our study of the Supreme Court's work since 1949 will we be paying special attention to its interpretation of the B.N.A. Act. These matters, as we have indicated, are more directly concerned with federal rather than bicultural issues. Only where the Supreme Court's constitutional decisions may impinge directly on a bicultural question, especially in the field of civil liberties, will the quantitative and qualitative analyses of the Supreme Court's decisions touch these federal matters. In addition, the detailed study of the Court's procedures will examine the representative character of the Court's composition, and this may shed some light on the Court's capacity for serving federalist values.

Outside the realm of constitutional law, the wide scope of the Supreme Court's appellate jurisdiction in ordinary areas of law raises another issue which may be a source of federalist discontent. The fact that from the very

¹ Below, page 153

outset the Supreme Court has been vested with authority to hear appeals in cases dealing with matters subject to provincial legislative jurisdiction, as well as those falling under federal jurisdiction, has meant that there is no division of judicial authority paralleling the division of legislative powers in Canadian federalism. As we pointed out above, the Judicial Committee's decision in 1947 which removed any constitutional obstacles to Parliament's abolishing all Canadian appeals to the Privy Council, consolidated the unitary nature of Canada's judicial structure. This decision confirmed the federal legislature's power under section 101 of the B.N.A. Act to assign final appellate authority in all legal matters - federal and provincial - to a federal appeal court created and regulated by the federal parliament.

This failure to extend the federal principle from the legislative to the judicial sphere is not an unusual feature of federal states. Indeed, of the classical federal countries, only the United States comes close to having a dual system of courts, one set to apply and interpret federal law and another to apply and interpret state law. And even there, of course, the jurisdiction of each set of courts is far from being exclusive of the other.¹ It is difficult

¹For instance, Henry M. Hart Jr. analyzing the relations between state and federal courts in the United States writes that "state courts are regularly employed for the enforcement of federally-created rights having no necessary connection with state substantive law while federal courts are employed for the enforcement of state-vested rights having no necessary connection with federal substantive law." "The Relations between State and Federal Law" in A.W. MacMahon (ed.), Federalism: Mature and Emergent (Russell & Russell, 1952), 177, at p. 184.

enough to classify the subject matter of a complex piece of legislation under national or local heads of power. It is much more difficult, again, to take the myriad questions which crop up in all the lawsuits which are constantly being fed into the country's system of courts and sort them into matters coming under national or local spheres of jurisdiction. Certainly any attempt to work out a federalist division of jurisdiction in handling a country's legal disputes would be bound to confront some enormously complex jurisdictional tangles.

In Canada, those who have favoured a division of judicial jurisdiction closer to the federal division of legislative powers have usually only gone as far as proposing cutting off appeals from provincial courts to the Supreme Court in cases which involve only provincial law issues. This proposal, it should be noted, would not go very far towards realizing a federal division of judicial authority. It would leave the provincial courts with original jurisdiction over most aspects of federal law, for ever since the decision was taken in the first few years after Confederation not to press ahead on a large scale with the development of additional federal courts for the enforcement of national laws, the national legislature, like its counterpart in Australia and Switzerland, has relied mainly on provincial

courts for the application of its laws.¹ There is no indication that even the stanchest federalist would be interested in reversing this trend and, at this stage in the country's history, call for the establishment of what would have to be a very extensive system of federal courts to deal with all disputes, especially in the broad fields of criminal and commercial law, with which the federal legislature is concerned. Besides this, the federal pattern of organization is further violated in the Canadian judicial system by the fact that the national government appoints all the judges of the Superior, District and County Courts in the provinces.²

It may be that this latter point raises the element in the existing system which is most vulnerable to the federalist point of view. A fairly large degree of overlapping in the jurisdiction of regional and national courts is probably an inescapable feature of a workable federal system, but exclusive national control of all senior judicial appointments - at both national and provincial levels - is not. K.C. Wheare, for example, after acknowledging the compatibility of the former situation with federalism goes on to

¹That is not to say, of course, that no federal courts have been established under Parliament's power in Section 101 of the B.N.A. Act to provide "additional courts for the better administration of the Laws of Canada." Among such courts are the Exchequer Court, the Board of Transport Commissioners, the Tariff Board, the Income Tax Appeal Board and the Court Martial Appeal Court.

²Section 96 of the B.N.A. Act.

state that "on the other hand, the case of Canada, where the appointment of all judges is in the hands of the general government, is an example of a system which contradicts the federal principle".¹ While the substantial responsibilities of provincial judges in federal law matters makes some federal participation in their appointment appropriate, by the same token, it could certainly be argued that provincial governments should be involved in the appointment of all provincial court judges and, possibly, on the basis of the same logic, in the appointment of those federal judges (i.e., of the Supreme Court of Canada) who have a final appellate control over provincial law matters. An incidental benefit of such an approach might also be the removal of fetters on the development of provincial administrative tribunals which the judicial construction of Section 96 of the B.N.A. Act has imposed on the provinces.²

Again we must stress that the research we have carried out on the Supreme Court's development since 1949 does not bear directly on the federalist critique of the Court's jurisdiction over provincial law matters. What we have been aiming at here is simply to untangle the principal points of view from which the Supreme Court might be

¹Above, page 116, footnote 1, p. 71.

²See Moris G. Shumatcher, "Section 96 of the British North America Act Re-examined" 27 Canadian Bar Review (1949) 131.

evaluated in order to single out the particular aspects of the Court that are related to bilingual and bicultural considerations. As for the relationship between the federalist concerns which we have discussed, and the bilingual and bicultural questions we deal with below, two points should be made. First, the issues raised by federalist criticism of the Supreme Court are in fact taken up mainly by Quebecers. We have already noted this in relation to the Supreme Court's role as a constitutional umpire. Again, in relation to the Supreme Court's review of provincial law matters, not too many outside of Quebec would be apt to argue that "because of the greater familiarity of local judges with the relevant social context",¹ provincial judges should control the shape of the law in crucial fields of provincial law. This argument obviously has special relevancy to Quebec with its very distinctive private law system. And, indeed, the desire for some degree of legal uniformity which is the point most often made for the retention of national appellate review of provincial law questions, is likely to be least convincing to Quebec opinion.² The second point, however, that should be

¹ Prof. Albert S. Abel, above, page 41, footnote 1.

² For a discussion of the Supreme Courts function in securing uniformity of law in Canada, see John Willis, "Securing Uniformity of Law in a Federal System". 5 University of Toronto Law Journal (1944) 352. As Professor Willis acknowledges and as Section 94 of the B.N.A. Act implies uniformity of laws related to property and civil rights is a value which only the common law provinces are likely to accept.

made about the relationship of federal to bicultural concerns, is that the very fact that the points of criticism raised by a federalist analysis of the Supreme Court have the biggest following in Quebec, and indeed tend to spill over into the special concerns of French Canadians in Quebec, suggests that one way of dealing with the special concerns of Quebec would be to adopt general federal solutions. Although it is clear that if such a course were adopted and, let us say, all the provincial governments and not just Quebec's, were given a voice in judicial appointments or all appeals to the Supreme Court in matters relating to "property and civil rights", and not just Quebec's, were terminated, such measures would be regarded as far more meaningful and worthwhile in Quebec than in any of the other provinces.

2. Bicultural Concerns

Besides evaluating the Supreme Court in terms of federal principles, the position of the Court can also be examined from the point of view of French-English relations in Canada. In so far as the interests of French culture in Canada are represented by Quebec, then, to that extent the federal concerns which we examined above might overlap and contain the bicultural needs and aspirations of French Canada. But it also seems worthwhile, one might even say mandatory in the context of the Royal Commission for which this study is being prepared, to isolate for detailed study those aspects

of the Court's contemporary organization and work which have a direct bearing on bicultural questions. When this is done, it is possible to distinguish three distinct areas of investigation: bilingualism in the Court's proceedings, the dualism of private law systems (the English common law and the Quebec civil law), and the broader clash of cultural values along a bicultural axis. Most of the quantitative and qualitative examination of the Court's decisions since 1949, which we have undertaken, focuses on various phases of these issues. But as a preface to our report of that study, we wish to state the questions which seem paramount in each of these areas.

First, as far as bilingualism in the Supreme Court is concerned, the main contention is simply that since only three of the nine Supreme Court judges come from Quebec, it follows that the majority will not speak or understand French well enough to give French-speaking counsel the same opportunities to use their first language before the Court as English Speaking lawyers enjoy. The Junior Bar Association of Montreal's brief to this Royal Commission presents a recent expression of this viewpoint. After concluding that "the Courts and Boards of Quebec, especially in the Montreal area, are satisfactorily bilingual", the brief continues as follows:

A similar situation however does not exist in the federal courts. Despite Section 133 B.N.A. (1867) which permits a French speaking lawyer to use his own language before the Courts, this in fact has not been possible or practical. Up to the present, the majority of judges on the Supreme Court could not understand French. If a lawyer wished to convince the judges, he would have to draft his factum in English and argue in English. This was necessary if he was

to serve the best interests of his client. On the other hand, there has never been a French speaking judge on the Supreme Court who could not understand and speak English. It seems that bilingualism has been a requirement for French speaking judges but not for their English speaking counterparts.¹

This charge will be investigated in the first part of our detailed study. The extent to which both languages are and can be used in the Court's proceedings and records will be examined. In the light of this examination, possible methods of increasing the bilingual quality of the Court will be considered. Finally, in looking at the Court's decisions since 1949, we shall single out any cases in which the legal issue before the Court has confronted the Court with a bilingual problem, and see how the Court has treated such problems.

It should be noted here that the complaint about the difficulty of using French in the Supreme Court has customarily been much less significant than anxiety about the Supreme Court's effect on Quebec's legal culture. In the historical narrative we traced the early expressions of this protest when there was some tendency to assume that the members of the Judicial Committee possessed a higher degree of linguistic versatility than the English-speaking members of the Supreme Court. However, over time, much less was heard of this complaint and French Canadian opinion focused more on the question of legal biculturalism. But this latter concern cannot, as Girouard argued over 75 years ago², be entirely separated

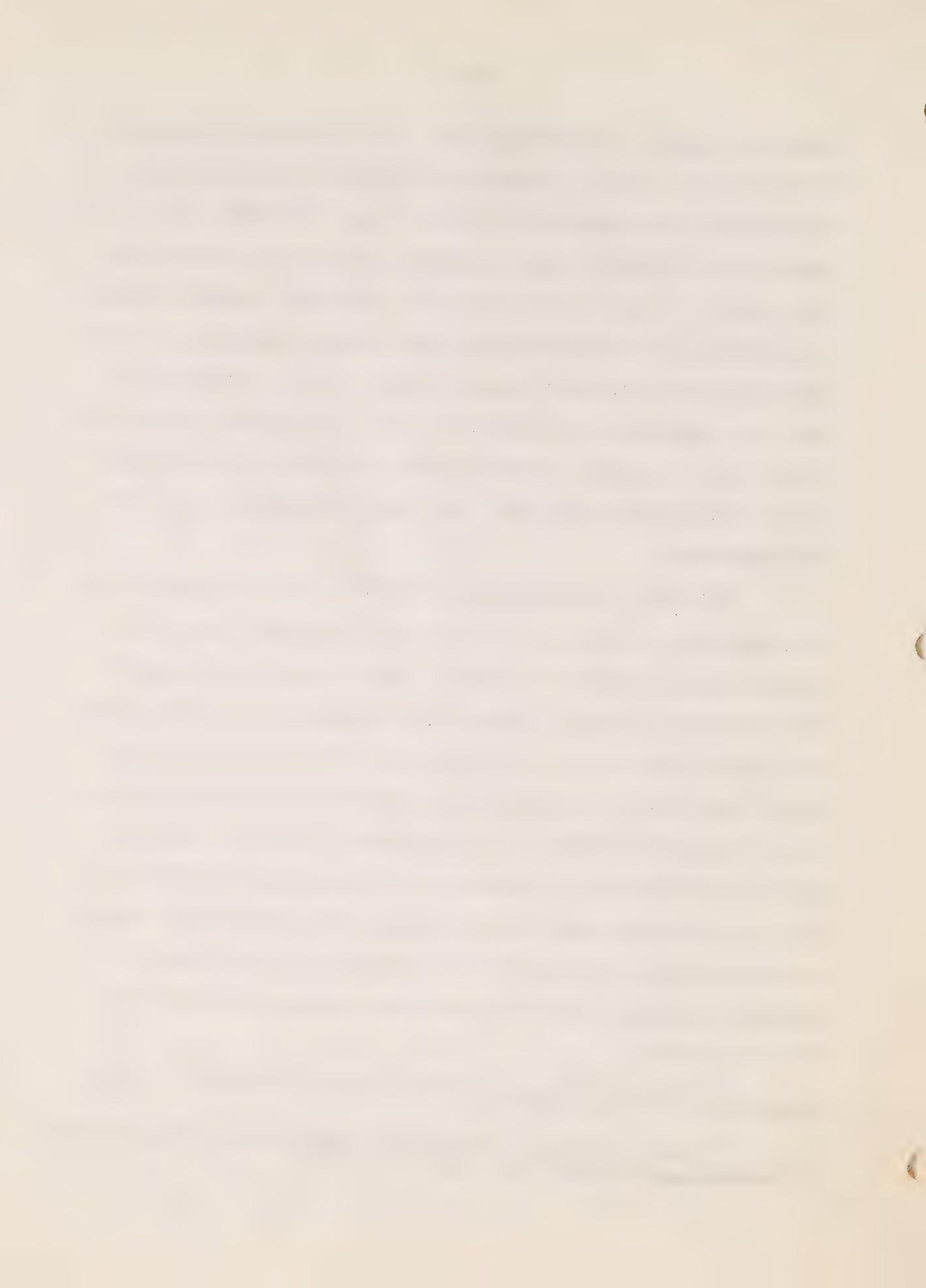
¹Submission No. 740-270, p. 8. ²Above, p. 54

from the question of bilingualism. If one wants to preserve Quebec's civil law as a distinctive system of private law, enriched by the great body of French legal doctrine that is associated with that legal tradition, then it is likely that the pursuit of such a goal requires a bar and a bench capable of mastering and contributing to the French-language scholarship which sustains that legal system. It is at this point that the linguistic capabilities of the judges who sit on the final court of appeal might well be a critical factor in the overall influence which that court has on Quebec's civilian jurisprudence.

The fate of Louisiana's French¹ civil law system may be instructive on this point for those concerned about the preservation of Quebec's system. There seems little doubt that without any formal legislative change, Louisiana's civil law system has over the years been very thoroughly impregnated with common law influences, so that it is now possible for a competent student of that system to conclude that "it must be admitted that Louisiana is today a common law state."² Now in Louisiana's case, the erosion of its distinctive legal tradition cannot be traced to the federal Supreme Court's ultimate appellate authority over that system, for with the

¹ There are also, of course, Spanish elements in the Louisiana civil law tradition.

² Gordon Ireland, "Louisiana's Legal System Reappraised" 11 Tulane Law Review (1937) 585, at p. 596.



dual system of courts operating in the United States, control over the interpretation of Louisiana's civil code would, for the greater part, rest in the hands of local judges. But on the state level, the absence of a pervasive French culture has been one of the most obvious factors at work in the ~~Anglo~~ci-
zation of the State's legal system. Professor Ireland in his study of the evolution of Louisiana's legal system, reports that "use of the French language before and by the courts though perhaps not unlawful, has been unheard of for many years, and three-quarters of the bar of Louisiana are probably unable to read the French commentators in their own tongue."¹ Another Louisiana jurist, Sidney Herold, anxious to see Louisiana retain its unique legal system, insists that its bar and bench must be able to read French sources of their code on the grounds that "one cannot know the history and background of the Articles of the Louisiana Code without at least a working knowledge of reading French."²

In Quebec, of course, there seems as yet to be no real anxiety as to the extent to which French sources are taught in its law schools and used by members of the provincial bar and bench. However, if the charge referred to above were well founded so that not only were a majority of the

¹ Same, p. 595.

² "The French Language and The Louisiana Lawyer". 5 Tulane Law Review (1931) 169, at p. 176.

Supreme Court's members unable to mine French sources, but also French Canadian lawyers were discouraged from citing such sources before the Court, then the experience of Louisiana might well be regarded as a warning signal to French-Canadian jurists concerned about preserving the purity of their legal system. But a careful investigation of this particular kind of influence which the linguistic limitations of the Supreme Court might have on Quebec's system of Civil Code, would have to go beyond the mere study of the Court's procedures and personnel presented in this report. It would require above all an extremely painstaking examination of the Court's jurisprudence in relation to the Civil Code, which would go far beyond the capacities of this project. Nevertheless, this relationship between the use of language in the Court and the Court's impact on Quebec's Civil Code, must be acknowledged as a possibility, even if it is one upon which this particular study cannot shed much light.

Turning to the second area of bicultural concern - the Supreme Court's treatment of the common law-civil code dualism - we confront what has undoubtedly over the years been the most persistent source of Quebec discontent with the Supreme Court. In the historical section we traced how as early as the Confederation Debates French Canadians voiced their fear that the vesting of the highest appellate powers over all matters of law, including the civil law of Quebec, in a Supreme Court containing a majority of common law judges, would eventually

result in the large scale infiltration of common-law principles into Quebec's civil law. At all the stages of debate through which the Supreme Court has passed right up to the present day, this has continued to be ~~the~~ main theme of French Canadian criticism of the Court. It has usually stimulated the advocacy of two alternative types of reform: either the termination of all appeals from Quebec Courts to the Supreme Court in cases dealing with the Civil Code, (or more broadly with property and civil rights in the province) or else, as an alternative approach, the reorganization of the Supreme Court to ensure that in all such Quebec appeals the civilian judges on the Court have a controlling voice.

Our study of the Supreme Court's decisions touches on this critical question in two respects. In our quantitative analysis we have attempted to simply provide a statistical account of the degree to which the non-civilian members of the Court have played a decisive role in Quebec appeals during the various periods of the Court's existence. In the section following this which presents a more jurisprudential analysis of the leading cases in the Court's modern docket touching bicultural issues, we examine, among other things, some of the recent cases in which the Court has divided on civilian-common law lines on matters relating to Quebec's civil law. These parts of our research, it is hoped, will provide some indication of the overall weight which common law judges have had in reviewing the decision of Quebec judges, and provide some illustrations of the kind of Quebec lawsuit which

might pit the common law judges on the Court against their civilian brethren. However, it obviously cannot pretend to provide anything approaching a definitive assessment of the common law influence on Quebec's civil law which has resulted from the Supreme Court's exercise of its appellate authority. Such an assessment would have to be based on an extensive examination of the way in which the Supreme Court has shaped Quebec's civil law both in terms of substantive legal precepts and general judicial techniques. In order to isolate and comprehend the Supreme Court's influence such a study would have to compare the Supreme Court's own contribution to Quebec law with that of the Privy Council and that of the Quebec courts themselves. Already a number of French Canadian scholars have made substantial contributions to this kind of study, but there is still much that remains to be investigated.¹

While this detailed legal scholarship is unquestionably the indispensable step in revealing the full extent of common law influences on Quebec's civil law, what perhaps is too often left out of account are the alternative ways of evaluating this influence once it is revealed. Of course, one's objection to the Supreme Court's review of Quebec decisions dealing with civil law matters may be based primarily on principle. One might argue that regardless of the actual ways in which the Supreme Court's treatment of civil law has affected

¹See for instance the works cited above in the historical account of French Canadian attitudes to the Court, pp. .



Quebec society and changed its legal culture, it is wrong in principle to give a federal court, containing only a minority of Quebec judges, the power of revising the decisions of Quebec courts in matters relating to Quebec's distinctive system of private law. From this point of view, the citation and analysis of actual cases can only provide corroborating evidence for an already well formed judgment. At the level of popular, political discourse this rather ideological attitude to the question has been most prevalent.

It is, however, possible to take a more pragmatic approach which requires a close study of actual judges and actual cases. To begin with, one would want to ascertain, more carefully than has been done to date, the extent to which common-law judges lack competency in handling civil law matters. It may be that given appropriate methods of consultation and collaboration on the Court, plus enlightened appointments, Supreme Court judges not formally trained in the civil law tradition can, in a reasonably short period of time, acquire enough knowledge to justify their reviewing the judgments of the highest Quebec court. Secondly, once the particular forms of common-law influence on Quebec's civil law system are ascertained and traced to Supreme Court Judges, a number of further questions might be asked. How have these "distortions" of Quebec's civil code affected the particular rights of Quebec litigants, and, more generally, legal relations in

Quebec society? Are these effects just or unjust, beneficial or adverse? Is there a comparative law advantage in any of these common-law infiltrations of the civil code? On the other hand, has the presence of civilian judges on the Supreme Court had a counter-balancing effect on the law of the common-law provinces? Again, have these been beneficial effects? Of course, the answer to any of these questions must hinge on the values one holds both in relation to various areas of social policy as well as in relation to alternative patterns of legal development. But the point is that once the discussion of the Supreme Court's impact on the civil law of Quebec passes the essentially ideological point, they are questions which can only be answered by first defining the values and premises upon which one's answers will be based.

The third area of bicultural concern which we have defined revolves around those legal issues which come before the court and which would, at least potentially, appear to turn on a conflict of French vs. English values. Since 1949 a large number of cases have been brought before the Supreme Court involving potentially bicultural issues in such areas as family relationships, morals, religious beliefs, education and civil liberties. A number of these cases, especially in the field of civil liberties, have concerned questions of great public importance. Many of them have been appeals from decisions of the Quebec Courts, and in some of the most prominent of these cases, the Supreme Court of Canada has

reversed the decision of the Quebec Courts. All of this has produced a heightened awareness of the possibility of bicultural conflicts across a broad range of legal issues adjudicated by the Supreme Court.¹

Our research on the Supreme Court's post-1949 decisions has tried to ascertain the extent to which this possibility is an actuality. In the quantitative part of our study we have first carried out a comparison of the Supreme Court's disposition of Quebec appeals in various categories of legal issues with its disposition of appeals from the other provinces. Also, by analyzing voting patterns we have tried to see whether or not ethnic blocs are operative in the Court's decision-making. Secondly, we have looked closely at a variety of cases in which there would appear to be at least a possibility that differences among the judges might hinge on differences in their ethnic or religious backgrounds. In these cases we have endeavored to answer two questions: (1) is there any evidence in the judges' opinion to suggest that their ethnic or religious attitudes have, in fact, been a significant factor in influencing their conclusions? (2) Where judicial disagreements do appear to have been at least in part

¹ One of the scholars who has been most sensitive to this development is Professor Edward McWhinney. See, for example, his article on "Federalism, Pluralism and State Responsibility - Canadian and American Analogies". 34 New York University Law Review (1959) 1079. See also his Comparative Federalism, (University of Toronto Press, 1963).

the result of French-English, or possibly Catholic-Protestant differences, how has the Court resolved these differences?

One crucial point should be made here as a qualifying note to the general public discussion of bicultural divisions on the Court and to our investigation of this matter. In this area of discourse, it may be too readily assumed that the Quebec judges on the Supreme Court, or at least the French-speaking Quebec judges, represent French-Canadian cultural values. It may also be questionable to assume that judges who sit on Quebec's Court of Appeal, and whose decisions can be reversed by the Supreme Court, are also representative of French-Canadian culture. ~~Neither of these assumptions may be correct.~~ If we set aside the whole problem of identifying a French-Canadian (or for that matter, an English-Canadian) consensus on the values involved in these 'bicultural' law-suits, and assume that something approaching a prevailing French-Canadian attitude to these issues exists, it still does not necessarily follow that Quebec judges share and apply these prevailing attitudes. Indeed, given (1) the fact that the federal government appoints both Quebec provincial judges and Quebec judges on the Supreme Court, and (2) the fact that once appointed Quebec judges usually remain on the Court until retirement at age 75, it is possible that these Quebec judges in their basic value orientations might be quite out of step with the prevailing tone of French-Canadian society in Quebec,

particularly at a time when that society is passing through a very dynamic period of social change.

Even if this were the real situation, and Quebec's representatives on the Supreme Court, or even her own provincial judges, were in a significant way unrepresentative of the main stream of her cultural life, this in itself might not diminish the seriousness from a bicultural point of view of the recent divisions on the Supreme Court on important bicultural issues. The very fact that such issues come before the Court and seem from their very subject matter to embrace questions upon which the country's two major cultural groups have different attitudes, might in itself suggest to the exponent of bicultural equality that the Supreme Court's structure should be seriously reformed. The obvious directions that such reform would take would be to organize the Court so that, at least in dealing with those areas of law sensitive to a bicultural division of opinion, French-Canadian judges are equal in number to English-Canadian judges. Also, if one were concerned about the degree to which French-Canadian or Quebec judges now represent the prevailing values of their society, one might advocate altering the system of appointment or tenure to ensure that such judges are more truly representative.

3. The Search for Judicial Statesmanship

Since 1949 a number of professional commentators,

especially in English-speaking Canada, have expressed a desire for the Supreme Court to play a more creative and statesmanlike role in developing Canada's legal system. This feeling embraces a number of different points of view and focuses on a number of different aspects of the Court's behavior. Although the considerations which this body of opinion entails are not per se concerned with bicultural or bilingual questions, they do raise issues which must be taken into account in appraising the Court's capacity for dealing with such questions.

The three main phases of the Court's performance on which this general current of thought has focused are its adjudicative posture, its decision-making techniques and the character of its workload or docket. While each of these aspects is a large subject in itself, a few general remarks on each in turn may be worthwhile here, in order to indicate what, from a rather professional, as opposed to a federalist or bicultural point of view, might be regarded as some of the Court's shortcomings as the country's highest judicial organ.

The most common point of criticism within this frame of reference is what is considered to be the overly conservative character of the Court's adjudicative posture. In particular, the jurists of the Supreme Court are accused of having adopted too rigid an adherence to the principle of stare decisis, and too narrow a conception of the principle

of legislative supremacy and the constraint which that principle imposes on their own law-making functions. Dean Horace E. Read in a perceptive study of the judicial process in common-law Canada concluded that "in the first half of the twentieth century the rigor of stare decisis, and the doctrine of legislative supremacy as applied in Canada, combined to produce a static and mechanical operation of law".¹ While Dean Read applied this indictment to all of the courts in common-law Canada, he and those who share his view, have looked to the newly emancipated Supreme Court to lead the way towards the development of a more creative and, for Canadian society, a more appropriate style of jurisprudence.

It has been easier for this body of critics to state what they find wanting in the Supreme Court's traditional pattern of adjudication than it is for them to indicate the precise ways in which these shortcomings might be overcome. The one common expectation or hope that they share is that the Supreme Court, now that it is at the apex of Canada's judicial structure, will adapt Canadian law more effectively to the changing needs of Canadian society. Such a wish is, after all, only the rational grounds for advocating judicial autonomy for Canada. The minimal requirement for the fulfillment of this hope is that the Supreme Court would be willing to diverge from English decisions when by doing so

¹"The Judicial Process in Common Law Canada". 37 Canadian Bar Review, (1959) 265, at p. 279-80.

it could adjust the law more appropriately to changing Canadian circumstances. Gilbert Kennedy echoed the feelings of many thoughtful Canadian lawyers when, in 1955, after criticizing the Supreme Court for a particularly uncritical adoption of an English precedent, he went on to say:

May I suggest that our Supreme Court faces the very great challenge to develop over the next few years, not merely the law in a few individual cases, but the approach to law in this country for years to come? Any attitude which ties us blindly to the House of Lords is, I suggest, merely the green light for a continuance of the stagnation in Canadian legal thought and development of which many of us are all too aware.¹

But beyond this general injunction to avoid a stultifying subservience to stare decisis and develop a more distinctive Canadian jurisprudence, it is not easy to state in precise terms the necessary ingredients of the desired judicial approach. What is called for is, above all, a state of mind in which the Court fulfills self-consciously and knowledgeably its function of making the law, as distinguished from merely applying it. Those who subscribe to this general position are quick to insist that they do not wish to see the Court usurp the position of the legislatures. But their basic contention is that in the process of adjudicating disputes by applying the law to particular instances, the Supreme Court, like any other court will, by virtue of the ambiguities,

¹Gilbert D. Kennedy, "Supreme Court of Canada - Stare Decisis - Role of Canada's Final Court" 33 Canadian Bar Review (1957), 340 and 630, at p. 632.

generalities or silences of the written, statutory law, be forced to make law, at least in the sense of applying established legal rules to unforeseen circumstances. When this occurs what is advocated is that the Court acknowledge the significant discretionary power which is inescapably thrust upon it, and seek not only the most appropriate modes of legal reasoning, but also knowledge of the most relevant kinds of social facts which might enable it to act wisely.¹

At a more practical level of criticism, the actual techniques and procedures followed by the Supreme Court in its decision-making process have been found by some to seriously reduce the Court's capacity for providing Canada with effective judicial leadership. Two related aspects of the Court's methods have caused most of the adverse comment: the lack of consultation in the process of arriving of decisions, and the Court's custom of seriatim opinion writing. On the first point, what is advocated is a more systematic use of judicial conferences in order to seek a consensus, or, where that is impossible, to clearly identify the significant points of difference. The absence of sufficient collaboration

¹Although there is little indication in Canadian literature of how judges might best acquire knowledge of societal facts or how such knowledge might be related to the outcome of their deliberations. For a discussion of some of these questions and references to relevant American literature, see Horace E. Read, above, page 145, footnote 1, at pp. 290-291. See also Edward McWhinney, Judicial Review in the English-Speaking World, (2nd ed. 1960, University of Toronto Press), pp. 203-212.

in decision-making would appear to be the main reason for the practice, in many cases, of individual judges writing their own judgments, even when there are no major points of difference between the different opinions. This might be criticized on the grounds that it results in either mere repetition, or hopeless confusion if it is impossible to identify one line of reasoning adhered to by a majority.¹

Finally, it can also be argued that the commonplace character of the bulk of the Supreme Court's business mitigates against the Court's assuming a role of distinctive judicial leadership. Only a small minority of the cases which come before the Court are likely to raise legal issues of fundamental importance to the country. Most of its work-load concerns rather mundane points of law which arise in private lawsuits. This is principally the result of the statutory rules governing the Supreme Court's jurisdiction, and the Court's own treatment of those rules.² In particular, the provision of appeals as of right in cases involving over \$10,000 accounts for at least half the cases on the Supreme Court's docket, and thus has a decisive effect on the nature of the Court's work load.³ On the other hand, in some

¹Bora Laskin, above, page 68, footnote 1, pp. 1047-8.

²See above, pp. 108-109 & below, pp. 287-290.

³See Chapter IV below, table for a quantitative analysis of the types of cases and sources of cases on the Supreme Court's docket since 1949.

instances where important civil liberties questions have been at issue, the Court has assumed a rather restrictive attitude with regard to its own powers of granting special leave to appeal.¹ Unlike the United States Supreme Court, which by carefully selecting the cases it will hear, confines its attention to cases which raise questions of great significance, mainly in the public law field,² the Canadian Supreme Court exercises relatively little control over the shape of its own docket, and spends far more of its time dealing with technical points of "lawyer's law" than with questions of larger public concern.

What should be borne in mind with regard to the points which we have very briefly canvassed here is that they represent another vantage point from which the Court's capacity for dealing with both bicultural and federal issues might be appraised. The conservative style of the Supreme Court's jurisprudence means, at the very least, that the Court's judgments on important questions touching bicultural or federal relations have usually been phrased in a technical, legalistic manner, making it difficult to detect any real policy choices which the Court may have confronted.

¹ For, a detailed examination of this tendency, see John Cavarzan, above, page 106, footnote 2, pp. 37-57.

² At one time a large number of cases reached the U.S. Supreme Court as a matter of right. But a series of statutes culminating in the Judiciary Act of 1925, gave the Court a large measure of control over its own docket so that it can concentrate on crucial questions of nationwide concern.

The lack of systematic consultation and discussion in decision-making has likely reduced the opportunities for negotiating agreements between judges representing different values or traditions so that the outcome of a case has simply been determined by mechanically adding together the separate conclusions of individual justices. And the relatively shapeless, undistinguished nature of the Court's work-load has not conditioned either the Court's bench or its public for recognizing the Court's function in determining questions which have an important bearing on French-English or federal relations.

It would take us far beyond the bounds of this study to investigate the possible reforms to which this mode of analysis might point. What should be noted is that any steps taken to increase the Court's capacity for concentrating in a deliberate way on the settlement of legal issues touching questions of great public importance are likely to intensify bicultural or federal concern about the Court. Indeed, it may be that the very judicial conservatism, which the Court's realist critics have attacked, by hiding the real value cleavages implicit in some areas of the Court's work muted these sources of anxiety. Now as legal realism becomes a more pervasive outlook, it is likely to produce a heightened sensitivity to the role which the background and social assumptions of judges might play in shaping their decisions. This, in turn, is apt to make French-Canadian or federalist critics of the existing Supreme Court set-up more

eager for something approaching bicultural or federal-provincial parity in the composition of the Court, particularly if the Court concentrates on those areas of law in which the opportunities for judicial law-making are particularly large.

Chapter III

Personnel and Procedures

1. Composition of the Supreme Court

In order to understand the bilingual and bicultural qualities and capacities of the Supreme Court we must gain some idea of how the Supreme Court is composed. Our approach in this section will be to look first at the legal and well-established, conventional principles which govern both the selection of Supreme Court judges and the division of labour among the Court's members. We shall then go on to explore some of the less obvious factors which appear to have affected the recruitment of Supreme Court justices. Finally we shall set out the most relevant information regarding the Court's non-judicial administrative staff.

(i) Statutory Requirements

The statutory requirements appertaining to the composition of the Supreme Court can be summarized in a few words. These rules are all contained in the Supreme Court Act.¹ They, first of all, vest in the Governor in Council the power of appointing the Chief Justice and the eight ordinary or puisne judges who make up the Court. Two restrictions are

¹R.S.C. 1952, c. 259 as amended by R.S.C. 1952, c. 335, 1956, c. 48.

legally imposed on the Government's choice of these judges: 1.) the appointee must either have been a judge of a superior court of a province or have had ten years professional experience as a lawyer, and 2.) at least three of the judges must come from either the superior courts or the bar of Quebec. Once appointed a judge is prohibited from holding any other office of emolument, either federal or provincial. The judges are required to reside in Ottawa. They hold office during good behavior, and are removable by the Governor General on address of the Senate and House of Commons. A judge must retire upon reaching the age of seventy-five.¹

Of course, all of these rules are merely statutory. There are no constitutional guarantees governing any aspect of the Supreme Court's composition. Thus, for instance, the requirement that one-third of the Court must come from the bar or bench of Quebec is subject to unilateral amendment by the Canadian Parliament.

(ii) Bicultural and Bilingual Aspects of Membership

It is this latter rule requiring a minimum of three Quebec judges which is most relevant to our interest in the bilingual and bicultural characteristics of the Court. As we have seen in the historical section of this study, the precursor of the existing rule was the provision, inserted in the first Supreme Court Act in 1875, requiring that at least

¹Same, sections 4 to 9.

two of the six Supreme Court judges come from Quebec.¹ In 1927, when the Supreme Court's membership was increased from six to seven judges, the minimal requirement for Quebec representation was not altered.² However, in 1949 when the Court's make-up was changed once again, this time to a nine-judge court, the Quebec requirement was raised to three.

The reasoning behind this special provision for Quebec representation on the Supreme Court's bench has always been based, primarily, on the bicultural dimensions of the Supreme Court's case-load. The requirement of a minimal number of judges drawn from the bar or bench of Quebec has been regarded as necessary in insure that there would always be some civilian jurists available to hear those appeals from Quebec which involve the application of Quebec's distinctive system of civil law. An analogous system is followed in Great Britain where the House of Lords as the United Kingdom's highest court of appeal hears appeals from Scotland whose local law, like Quebec's, is not common law, but rather is derived from the civil law tradition. By convention, some of the Law Lords in the House of Lords are always appointed from Scotland. However, as with the Quebec jurists' participation in the Supreme Court's decision-making, this

¹ Above, page 36.

² 1927 (Can.), c. 38.

arrangement has not given the Scottish judges the balance of power in cases appealed from Scotland, nor has it muted the protests of Scot jurists against the adulteration of Scottish law by the House of Lords' common law majority.¹

The 1949 increase in the legal requirement for Quebec representation from two to three judges was specifically justified as a means of avoiding a deadlock between the Court's civilian jurists. The Minister of Justice, Stuart Garson, gave the following explanation of the change:

We knew that when we created the Supreme Court as the court of last resort for Canada we would have to have appointed to the membership of that court enough civilians or judges trained in the civil law so that, in the event of there coming from Quebec a case involving any matters other than criminal law, it would be decided without a stalemate, having one civilian judge on one side and one on the other. That necessitates the appointment of three judges trained in the civil law on that court of last resort.²

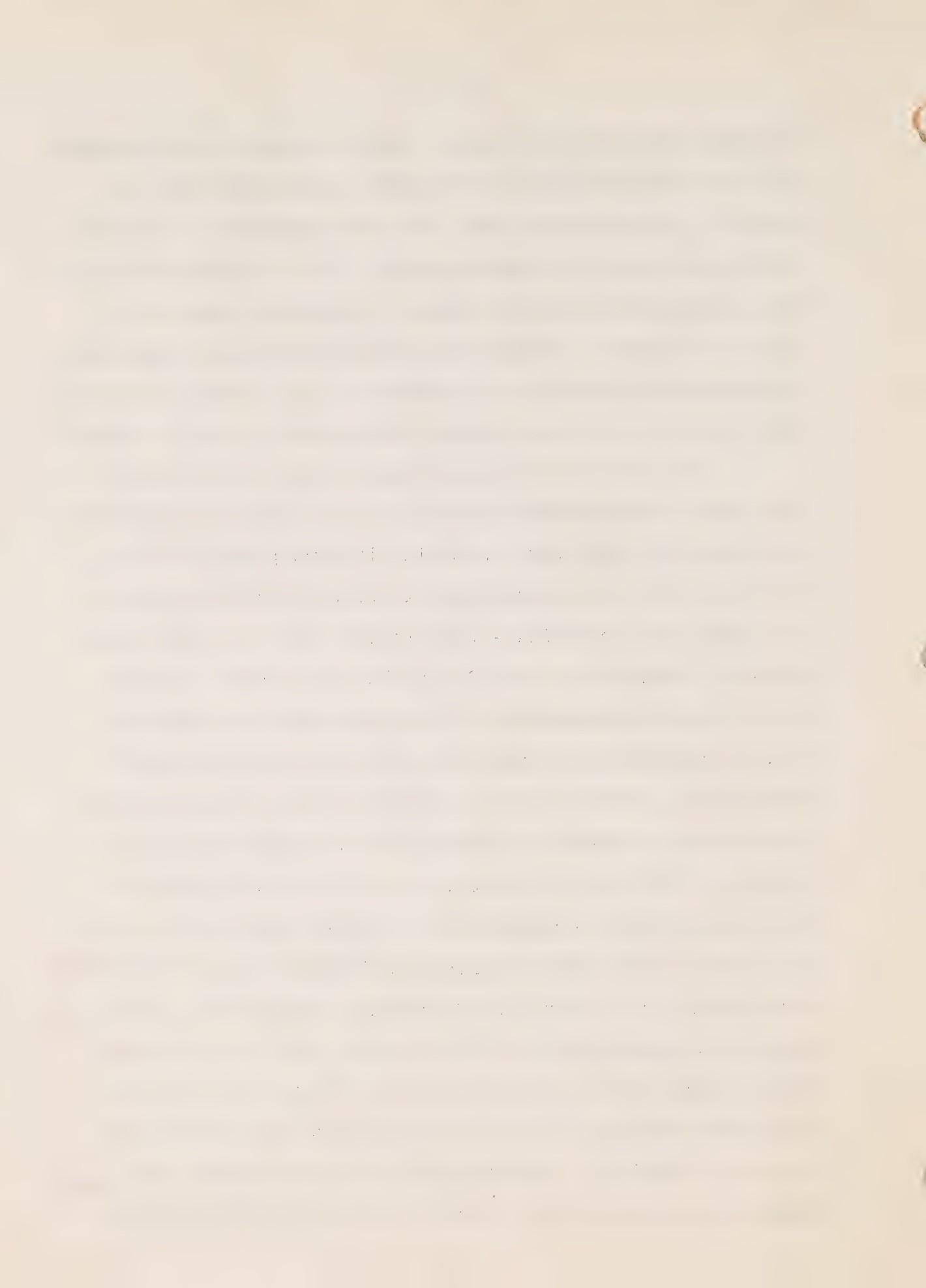
Mr. Garson's reasoning is perplexing. It is difficult to understand why the Supreme Court's becoming the final court of appeal for Canada should, in itself, make it more desirable to have an odd rather than an even number of civilian judges on the Court's bench. Moreover, with a minimum of five judges required for every case it would still be possible for one civilian judge allied with two or more common law judges to defeat the two other civilian judges in decisions

¹ See, for example, A.D. Gibb, "Inter-Relation of the Legal Systems of Scotland and England" 53 Law Quarterly Review, (1937), 61.

² Canada. House of Commons Debates, 2nd Session, 1949, pp. 662-3.

involving Quebec's Civil Code. Still it must be acknowledged that the 1949 addition of one Quebec justice did make it possible, for the first time, to have a majority of civilian jurists sitting for a Quebec appeal. In the final section of our quantitative study in Chapter IV we shall examine in detail the extent to which this increase in Quebec representation actually led to an increase in the civilians' control over the outcome of the various categories of Quebec appeals.

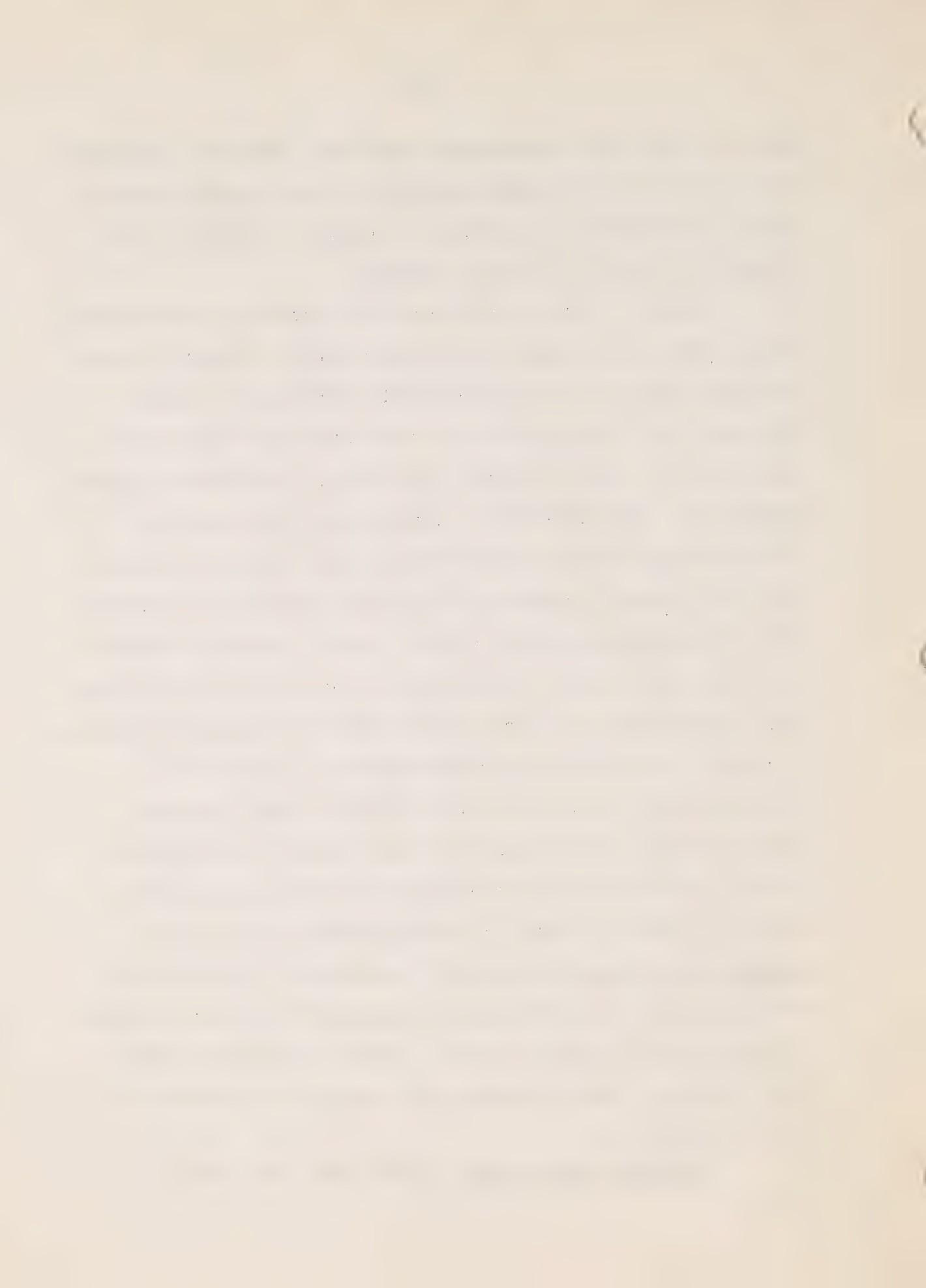
One other reason supporting the special provision for Quebec representation on the Court is that such a provision might be looked upon as making it more plausible that French-speaking litigants would in fact enjoy the right to use French when pleading a case in the Court - a right guaranteed to them by section 133 of the B.N.A. Act. However, the bilingual explanation of the statutory requirement for Quebec representation makes less sense than the bi-legal explanation. There can be no doubt that any judge appointed from the bar or bench of Quebec will be trained in Quebec's system of civil law. However, as the 1954 appointment of Mr. Justice Abbott demonstrates, a Quebec appointee need not be a person whose first language is French. There is another point which is of even more fundamental importance! While the Quebec requirements of the Supreme Court Act has meant that at least two or three judges are fluent in French, on the other hand all of the Court's members have always been fluent in English. Given this hard reality, despite the required presence on the Court of several French-speaking



jurists, any lawyer appearing before the Court who wanted to ensure that all the judges hearing his case would be able to follow his argument as closely as possible, would be well advised to plead his case in English.

Later in this chapter we shall explore in some detail the procedures and forms of the Court with a view to discovering the degree to which the Court operates in a truly bilingual way. As a preface to that study we wish here to comment only on the bilingual capacity of the Supreme Court's membership. The fundamental limitation of the Court's bilingualism we have already noted, while fluency in English up to the present appears to have been a necessary qualification for membership on the Court's bench, fluency in French has not. That is not to say that all of the Court's English-speaking members have come to the bench lacking any knowledge of French. Some of the English-speaking judges have certainly been highly proficient in the French language. Justice Strong, for example, who was one of the first two Ontario appointees and who became Chief Justice in 1892 was reputed to be well versed in French jurisprudence. The Canadian Law Journal cited his "Knowledge of the civil law and familiarity with the French language"¹ as a major reason for applauding his appointment. Another English-speaking Chief Justice, Francis Anglin, also came to the Court with a

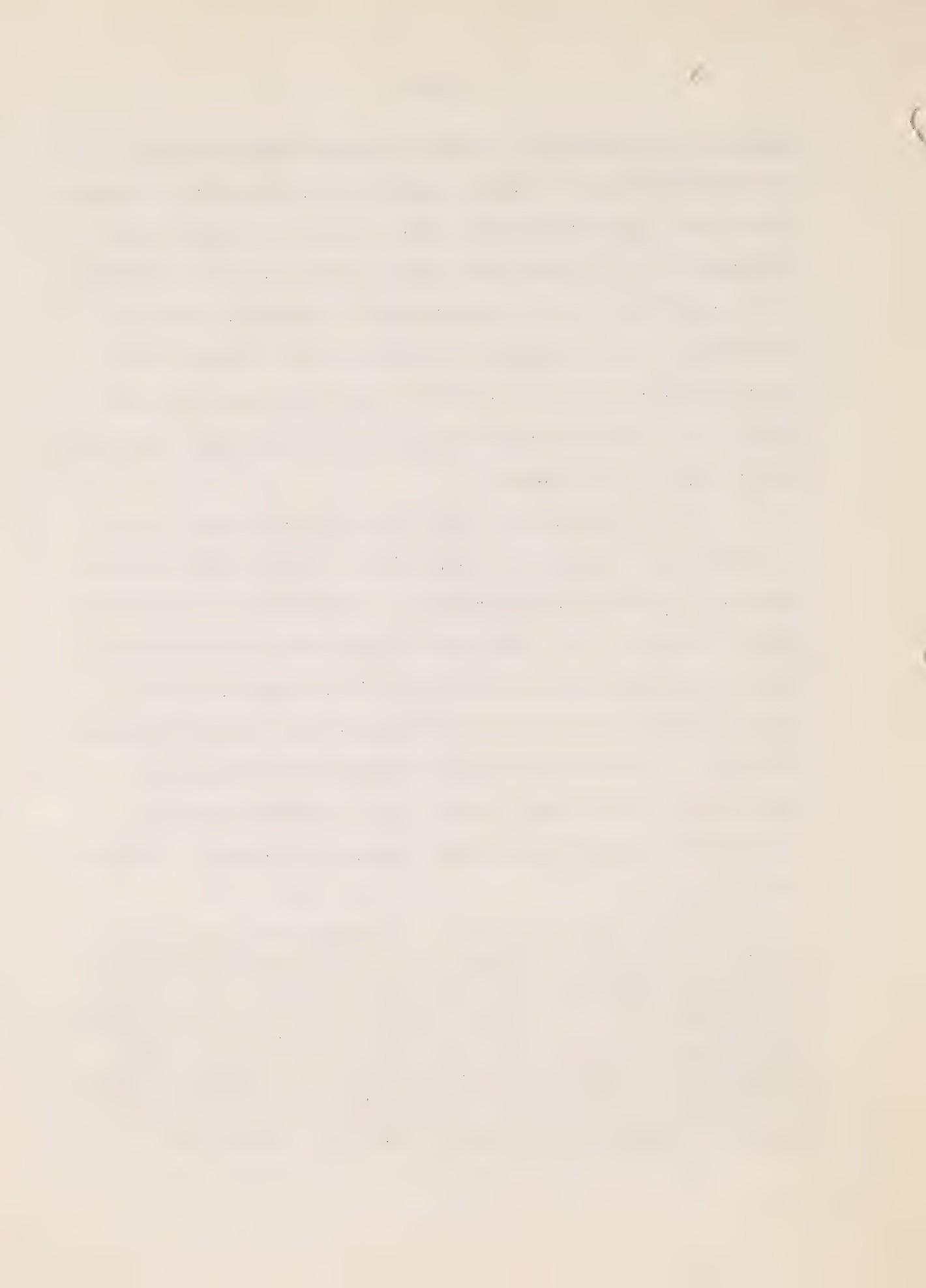
¹ Canadian Law Journal, (1875) 265, at p. 266.



considerable knowledge of French, having been educated at St. Mary's College, Montreal and at the University of Ottawa. While other English-speaking justices have had the barest understanding of French when first appointed to the Supreme Court, many have through experience and often by means of professional tutoring greatly improved their French while serving on the Court.¹ Certainly, as a minimum, we could assert that all the Court's English-speaking judges have been able to read French texts.

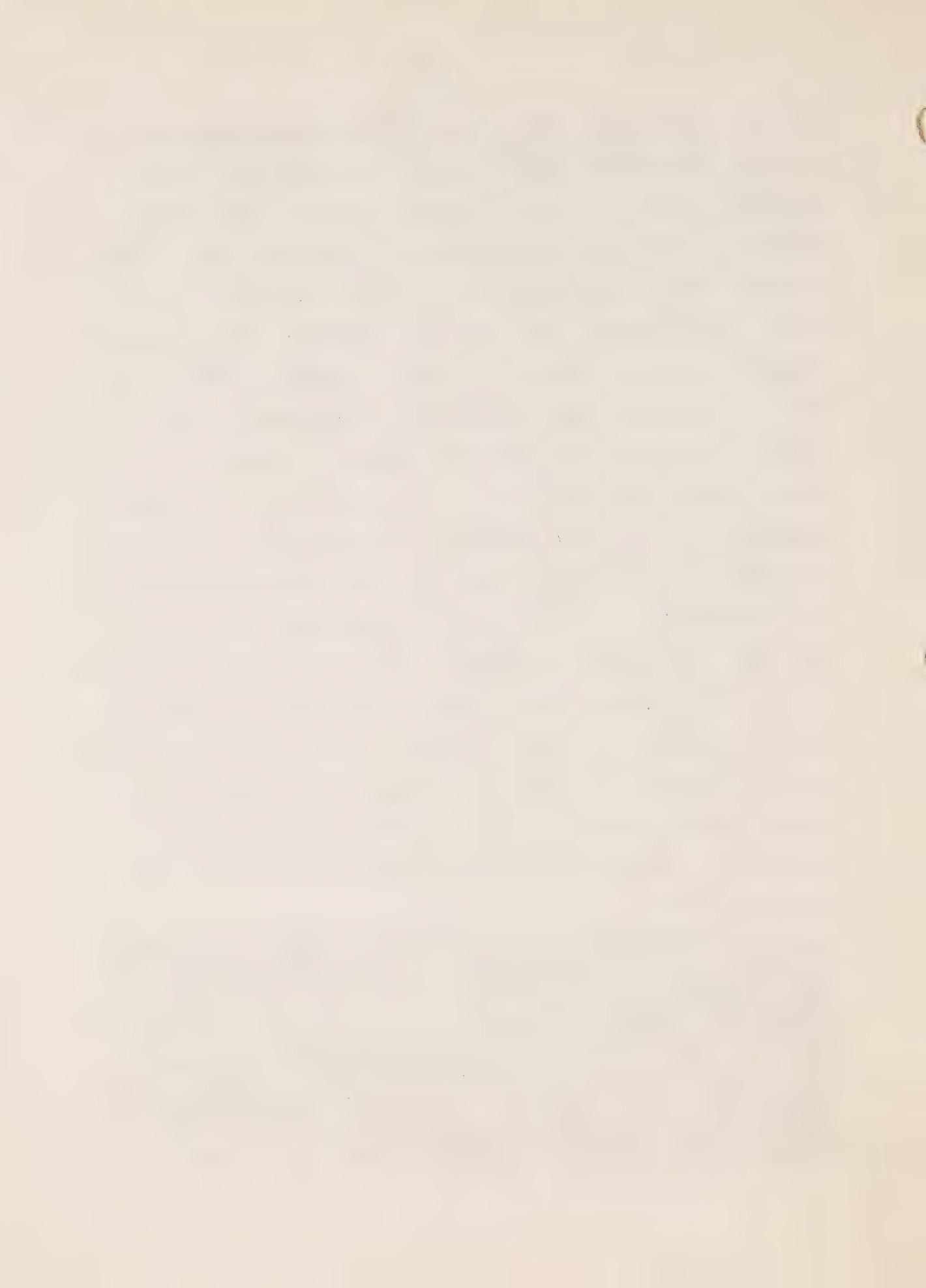
In our research, we have not gone back into history to examine the linguistic credentials of all of the Court's previous English-speaking members. However, we might very briefly refer to the linguistic capabilities of the present English-speaking members of the Court in order to give a clearer indication of how well equipped the Court's current personnel is for satisfying the demands of bilingualism. To begin with, no one would contest the statement that not one of the seven judges whose first language is English (Justices,

¹Chief Justice Rinfret, addressing the students of Osgoode Hall in 1953, stressed the efforts made by English-speaking appointees to the Court to learn French. In particular, he asserted that the three Ontario judges then serving on the Court, "... Justices Kerwin, Kellock and Cartwright, have spent long hours taking private tuition in the French language and they have attained a degree of fluency which permits them to follow the argument in that language without any difficulty whatsoever." Quoted from Thibaudeau Rinfret, C.J.C., "My 29 years on the Bench of the Supreme Court of Canada." 3 Chitty's Law Journal (1953) 63, at pp. 64-5.



Abbott, Cartwright, Hall, Judson, Martland, Ritchie and Spence) are as thoroughly bilingual as their two French-speaking colleagues, Chief Justice Taschereau and Justice Fauteaux. This view is bolstered by our inspection of the Supreme Court's reported decisions over the last fifteen years which reveals that, with the exception of Mr. Justice Abbott's two-page opinion in Chaput v. Romain [1955] S.C.R. 834, none of the Court's English-speaking members have written judgments in the French language. However, all of these judges have shown enough familiarity with the French language to quote from judgments written in French or interpret documents written in French.¹ The one exception to this last statement, as of the end of 1964, was Mr. Justice Hall. But this is probably a misleading exception, for we must bear in mind that Justice Hall's term on the Court has been very short. Moreover, when we note that he was born in Quebec and in recent months has been more frequently included among the judges hearing Quebec appeals, Justice Hall might well be regarded as considerably more bilingual than two or three of

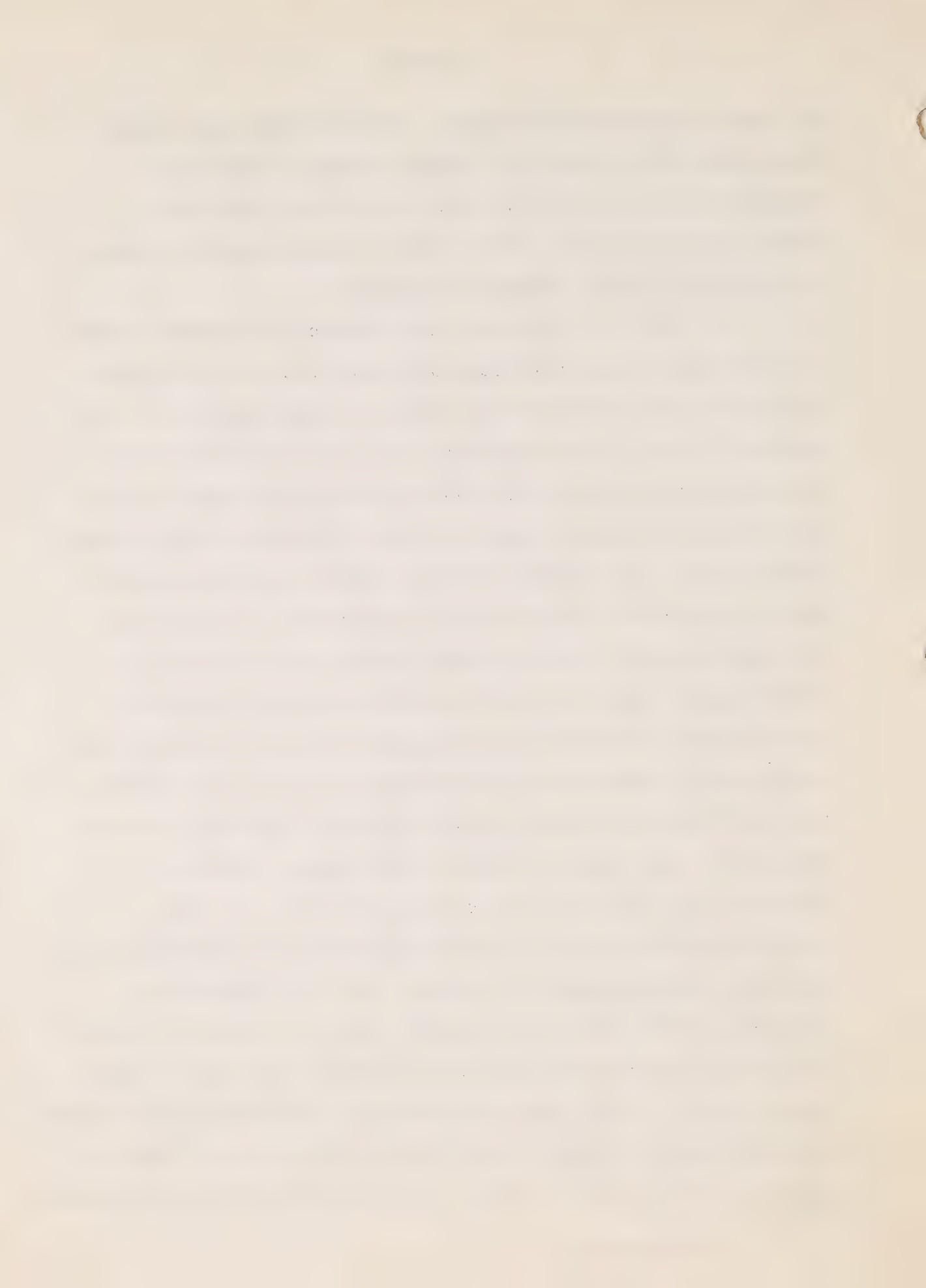
¹ Examples are Justice Ritchie in Magda v. The Queen [1964] S.C.R. 73; Justice Kellock in Reference Re Regina and Coffin [1956] S.C.R. 190; Justice Estey in T. Eaton Co. Ltd. v. Dame Lena Moore [1951] S.C.R. 470; Justice Rand in Beliveau v. Orange Crush Ltd. [1955] S.C.R. 706; Justice Kerwin in Robson v. The Minister of National Revenue [1952] 2 S.C.R. 223; Justice Locke in Greenshields v. The Queen [1958] S.C.R. 216; Justice Judson in Blais v. Touchet [1963] S.C.R. 358; Justice Martland in Union of Insurance Societies of Canton Ltd. v. Arsenault [1961] S.C.R. 766; Justice Cartwright in Roncarelli v. Duplessis [1959] S.C.R. 121; Justice Spence in Hatte v. Provencher [1964] S.C.R. 606.



his English-speaking colleagues. On the other hand against these isolated citations of French-language sources by English-speaking judges, we must set the fact that the French-speaking members of the Court have on numerous occasions rendered their judgments in English.

In Table 1b¹ below we have divided the Supreme Court's reported cases which have come on appeal from the provinces during the years 1950-1964 into four columns based on the four regional lists used in organizing the Court's docket. For each judge who served on the Court during those years we have shown the percentage of cases from each region in which he has participated. The judges have been listed according to the regions from which they have been appointed. If we look at the figures in the second column showing participation in Quebec appeal cases, we can see somewhat higher levels of participation recorded for those judges who by virtue of their background or experience and training acquired since joining the Court have achieved a higher degree of facility in French than their other English-speaking colleagues. Justice Abbott's very high level of participation is, of course, primarily attributable to the fact that he is a civilian jurist. But still, having grown up in Quebec, with an educational experience which includes a year at Dijon University in France and having been involved in hearing several hundreds of Quebec appeal cases, he has certainly achieved a relatively high degree of proficiency in French. Also of the other current English-speaking Supreme Court justices, who have frequently participated

¹See page 166..



in Quebec cases, Justices Cartwright and Judson have both shown a fairly thorough comprehension of French. On the other hand, these figures do not suggest that a very low level of proficiency in French has ever barred English-speaking judges from participating in Quebec appeals. The lowest level of participation is 25%. This fact indicates that in many Quebec appeals where oral arguments are presented in French, judges are present who would have some difficulty in following the presentation of a case and who could only question French-speaking counsel through the medium of their thoroughly bilingual colleagues. There might be, in addition, a great many cases in which Quebec lawyers whose first language is French present their case in English in order that they might be understood by the full bench before which they must plead. This is one of the points which we will investigate more fully when we report below on the results of a questionnaire administered to French-speaking Quebec lawyers who appeared before the Court in recent years.

(iii) Regional Representation

Besides the statutory rule governing Quebec's representation on the Court, there is a well established series of precedents amounting now to an unwritten constitutional convention concerning the representation of other regions on the Supreme Court bench. The key to this convention is a maxim which flows from the seemingly irresistible demands of Canadian federal politics: Ontario must have at least as many places as



Quebec. Thus, as we have seen, when the Court was first established two positions went by law to Quebec, two to Ontario and the remaining two to the Atlantic provinces.

Table 1a shows the different patterns of regional representation through which the Court's composition has moved since 1875. It will be noted that up until 1927 when a seventh judge was added to the Court the principal deviations from the initial pattern were at the expense of Maritime representation. The first Western judge, Justice Killam of Manitoba, replaced an Ontario judge, but this regional distribution lasted only from 1903 to 1905. From 1906 to 1924, the Western and Maritime regions shared two positions on the Court and from 1924 to 1932 there was no one from the Atlantic provinces on the Supreme Court bench. In 1932 when Justice Crocket of New Brunswick replaced Justice Newcombe of Ontario, the seven-judge court settled down to a consistent pattern of two justices from each of Ontario, Quebec and the Western provinces and one from the Atlantic provinces.

The addition of two more judges to the Court in 1949 was prompted in part, as we have seen, by the desire to have three civilian jurists available for Quebec appeals. The Minister of Justice, Mr. Garson explained the need for the other non-Quebec addition, in terms of the increased amount of business which it was anticipated would come before the Court now that it was Canada's final court of appeal.¹ He denied

¹ Canada. House of Commons Debates. 2nd Session, 1949, p. 663.



that this place on the court would necessarily be occupied by an Ontario judge, and suggested that the occasion might even arise when it would be desirable to fill a vacancy on the Court with a fourth Quebec judge if he was the most outstanding candidate for the position. Indeed it was the essence of Mr. Garson's position that geographic considerations must not prevent the government from appointing the most qualified jurists to the Supreme Court bench. "It is desirable," he said, "that in appointing members to this court first regard should be had to their capacity to discharge their judicial duties. If we can have geographic representation consistent with that policy of appointment so much the better..."¹ Since Mr. Garson made this statement in 1949 seven changes have been made in the Supreme Court's membership without disturbing the pattern of geographic representation established in 1949 of three judges from Quebec, three from Ontario, two from the Western provinces and one from the Atlantic provinces. Whether or not this fidelity to the representational pattern has been achieved at the expense of Mr. Garson's first priority of professional talent, must remain a matter of conjecture.

It certainly makes more sense to explain the representational pattern we have traced as a response to political pressures than as a device for strengthening the jurisprudential qualities of the Court. It is entirely possible that geographic

¹ Same, p. 664.



Year	Quebec	Ontario	Maritimes	Western
1875*	2	2	2	0
1888	2	3	1	0
1893	2	2	2	0
1903	2	1	2	1
1905	2	2	2	0
1906	2	2	1	1
1924	2	3	0	1
1927	2	3	0	2
1932	2	2	1	2
1949	3	3	1	2

Regional Representation on the Supreme Court,

1875 - 1965

Table 1a

*The years listed are years in which an appointment to the Supreme Court altered the pattern of regional representation.



considerations might unduly restrict the federal government's freedom of choice in selecting Supreme Court justices. And even if we concede that there is some justification for a representational system designed to place on the federal appeal court jurists who have a special knowledge of legislation and local conditions in the country's federal divisions, it is impossible to fit the existing pattern of representation on the Canadian Supreme Court within this rationale. As the Court is now constituted the two central provinces, Quebec and Ontario, have six of the nine places on the Court, with the other eight provinces sharing the remaining three places. This means that there are always five provinces which have no representative on the Court. Nor does this distribution of justiceships coincide with the regional distribution of the Court's case-load. The Western provinces, as a group, were the source of more Supreme Court appeals during the post - 1949 period than either Ontario or Quebec¹ and yet had only two places on the Court compared to three each for Ontario and Quebec.

In Table 1b we have tried to see if regional factors have had any effect on the Supreme Court's division of labour. The Supreme Court's case load for any given session is broken down into regional lists and for most cases the court sits in bancs of five. Table 1b shows that during the

¹From 1950 to 1964 there were 286 Western appeals resulting in recorded decisions as compared with 248 from each of Ontario and Quebec. During the same period there were 50 appeals from the Atlantic Provinces.



		MARITIME CASES	QUEBEC CASES	ONTARIO CASES	WESTERN CASES
MARITIME JUDGES	Rand	.94*	.57	.66	.66
	Ritchie	1.00	.45	.64	.75
QUEBEC JUDGES	Rinfret	.50	.83	.44	.52
	Taschereau	.40	.97	.44	.49
QUEBEC JUDGES	Fauteux	.48	.92	.42	.47
	Abbott	.56	.92	.46	.47
ONTARIO JUDGES	Kerwin	.51	.33	.77	.62
	Kellock	.66	.37	.51	.51
ONTARIO JUDGES	Cartwright	.84	.49	.88	.65
	Judson	.72	.50	.88	.63
ONTARIO JUDGES	Spence	.00	.25	.47	.56
	Locke	.67	.30	.65	.85
WESTERN JUDGES	Estey	.76	.49	.67	.87
	Nolan	.00	.29	.23	.65
WESTERN JUDGES	Martland	.72	.45	.66	.84
	Hall	.00	.26	.41	.65

Regional Participation in Supreme Court's Reported Decisions, 1950-1964

Table 1b

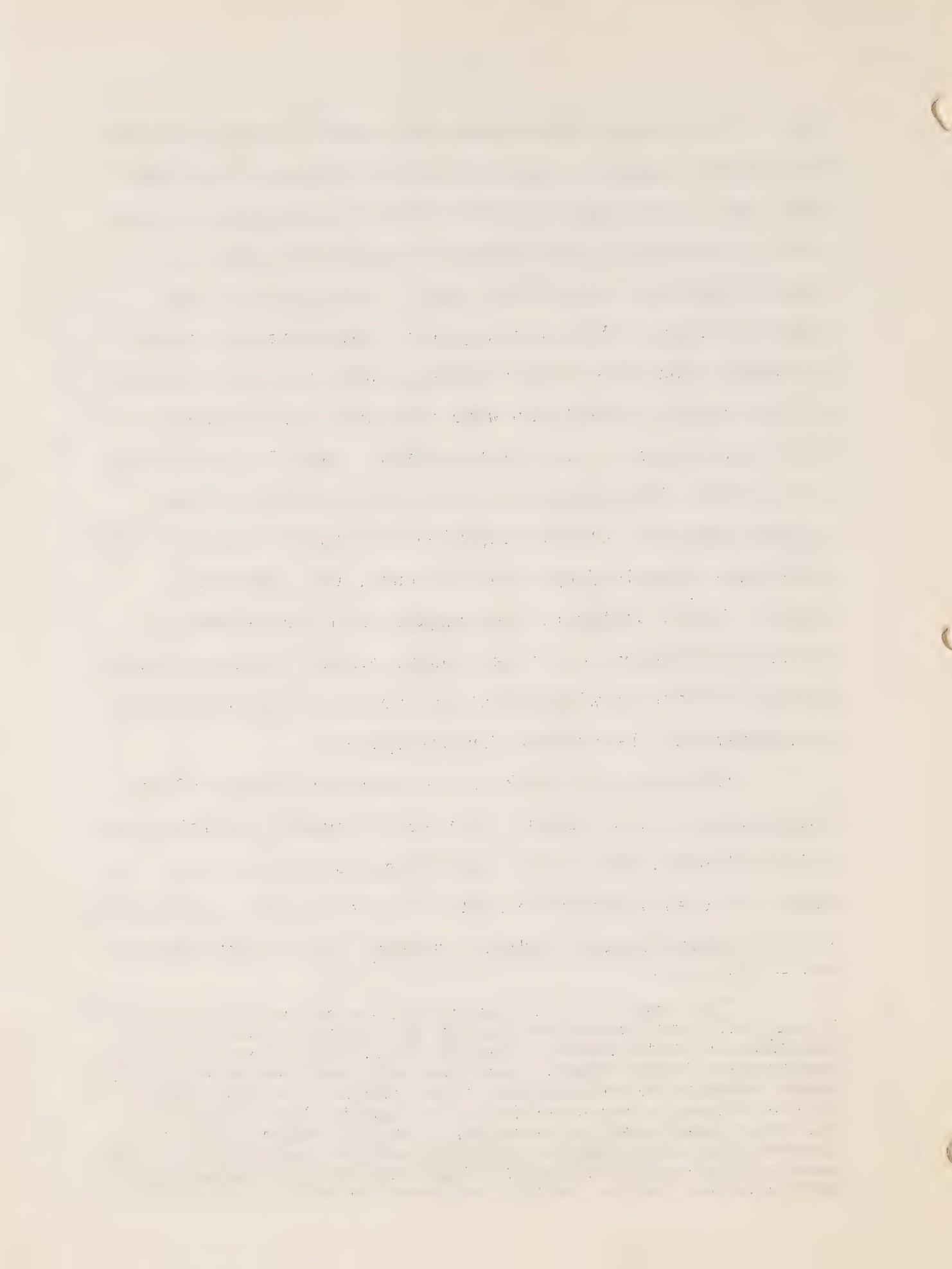
* Each figure records percentage of cases on each of the Court's regional lists in which judge participated.



post - 1949 period the Maritime and Quebec judges practised the highest degree of specialization in appeals from their own areas. The judges from the Western provinces have also shown a tendency to participate in cases from their own region relatively more often than in cases on the other regional lists. While the degree of specialization is not so marked among the Ontario judges, still the three members of the Ontario quintet who were the most active members of the Court during the post-1949 period, Chief Justice Kerwin, and Justices Cartwright and Judson, all registered their highest frequency of participation in Ontario appeals.¹ Also with three Ontario judges on the Court, the individual Ontario judge, unlike his colleagues from the Western or Atlantic provinces, can often absent himself from an Ontario appeal with the knowledge that one or two of his provincial colleagues will be present for the appeal.

If we were to think of the regional pattern of representation on the Supreme Court as not merely resulting from political pressures on the appointing authority, we can conceive of it as designed to meet at least in part the federalist concern about Canada's judicial system. The slight tendency

¹ The low levels of participation recorded for Justices Nolan, Hall and Spence are mainly the result of the short duration of their terms. Justice Nolan died a year after his appointment to the Court; Justices Hall and Spence began their terms shortly before the end of our period. A large number of the judgments reported during a judge's first session on the Court are based on cases heard at an earlier session. Consequently if a judge's freshman session represents a large part of his total time on the Court his overall percentage of participation in the Court's reported decisions will be low.



towards regional representation which characterizes the Supreme Court's division of labour will usually ensure that at least one of the justices hearing a provincial appeal case is from the province or region which is the source of the appeal.

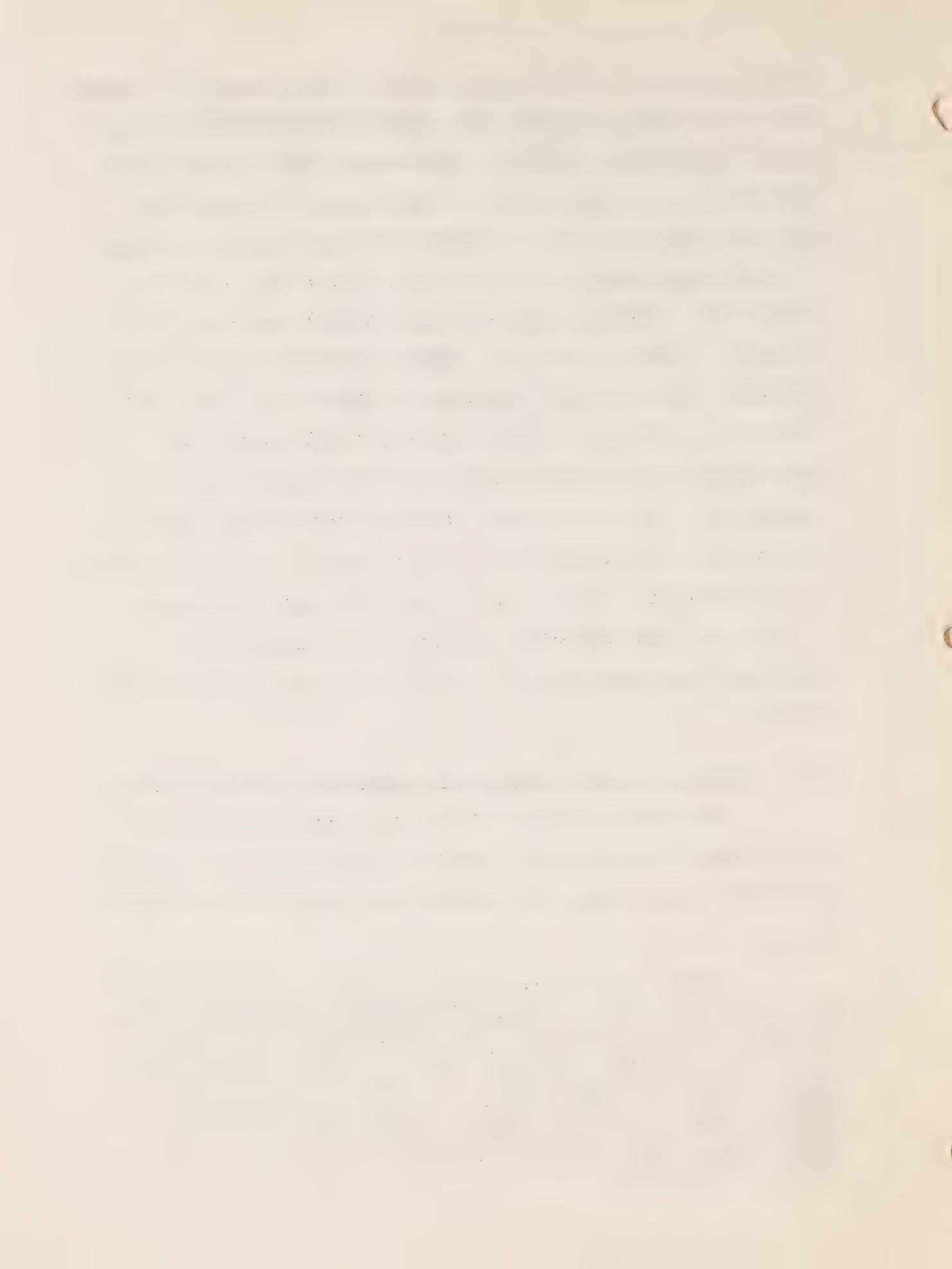
But this falls far short of arming the Court with the amount of local expertise which the advocates of a dual system of courts might demand. Only in Quebec appeal cases and in the occasional Ontario case will judges representing the province or region appealed from constitute a majority of the Court.

The real question is whether the very small measure of regionalization or federalization of the Supreme Court's organization which now exists is at all worthwhile, given on the one hand, the extent to which it fails to meet the demands of the federalist critic and on the other hand the extent to which the non-federalist regards it as introducing irrelevant considerations into the selection of Supreme Court justices.

(iv) Number of Judges Sitting for Different Types of Cases

Although the Court's total membership is now nine, it is unusual for all nine judges to sit for a case. Since the Court's beginning, five judges have constituted a quorum.¹

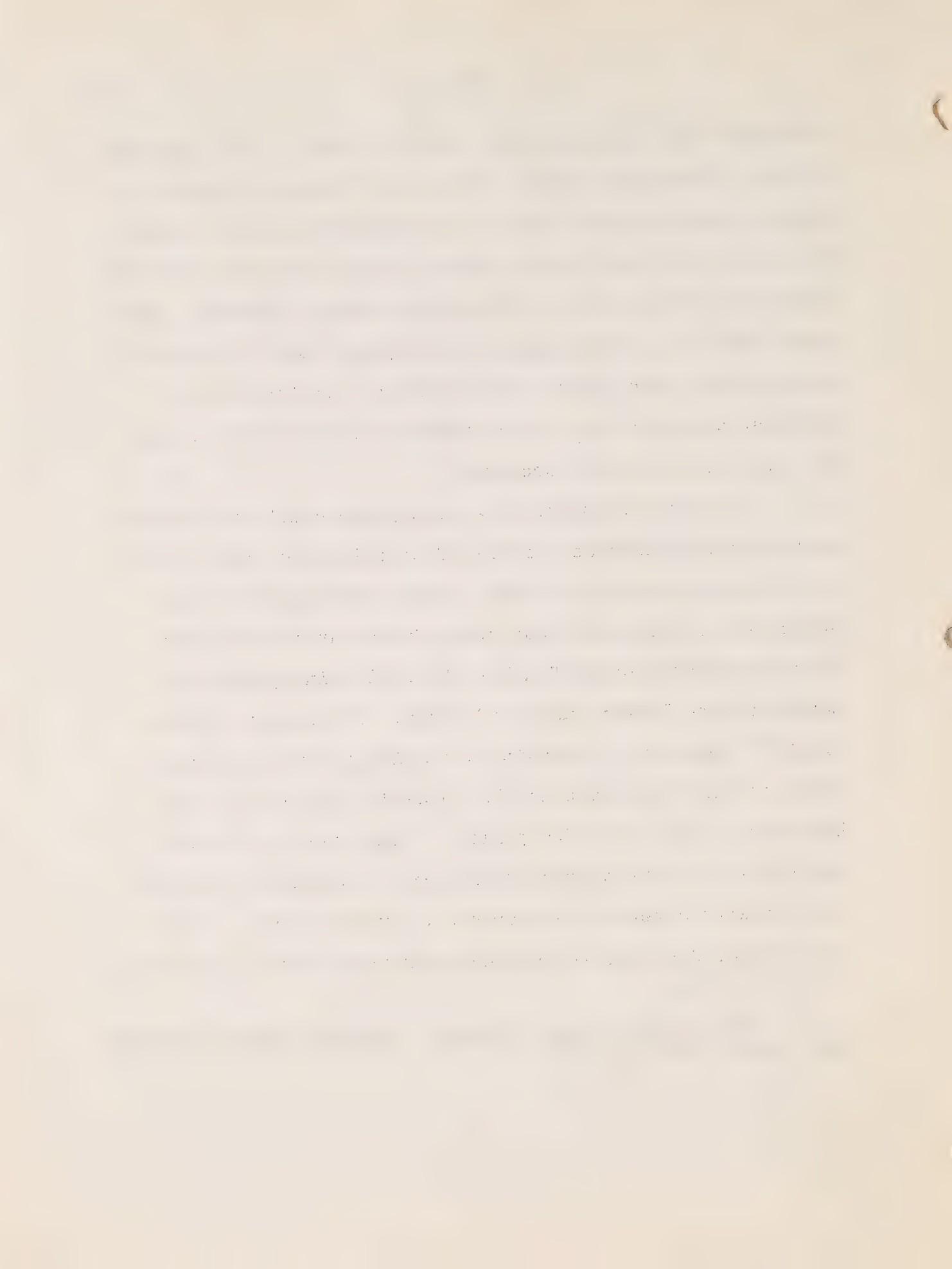
¹ There are some exceptions to this. In cases decided on the merits, four judges can constitute a quorum if both parties consent or if a judge is disqualified because he was a member of the lower court from which the appeal comes. R.S.C. 1952, c.258, s.29 and s.28(2). Also one judge can issue a writ of habeus corpus and three judges constitute a quorum to hear an application for leave to appeal to the Supreme Court, except in capital cases, where five judges are required. R.S.C. 1952, c.259 as amended by R.S.C. 1952, c.335, 1956, c.48, s.57 (1) and 44A.



Throughout its existence the Court for most of its cases has sat as a five-judge court. Thus, even though the number of judges composing the Court has increased from six to nine, the number sitting for most cases has not increased from the required quorum of five. When the quorum is exceeded, the Court sits as a seven-judge or nine-judge Court so that it can avoid an even split of its members. In the Court's earliest days, all of its six members often sat for a case and tie votes were not uncommon.

The establishment of a nine-judge court in 1949 was partially explained as a means of enabling the Court to sit in two panels, with the Chief Justice sitting with four judges at one time and four other judges at another time. This arrangement would "enable the whole nine judges to handle a much larger number of cases, if necessity should arise."¹ Apparently necessity did arise, for the Supreme Court sat in five-judge panels to handle the bulk of its business in the post-1949 period. These panels, however, did not follow the suggested pattern of combining the Chief Justice with alternative quartets of puisne judges. All three Chief Justices who served during this period, Rinfret,

¹Mr. Stuart Garson, Canada. House of Commons Debates. 2nd Session, 1949, p. 663.



Kerwin and Taschereau, were present in about the same proportion of cases as their colleagues.

It is one of the principal managerial functions of the Chief Justice to establish the panels or divisions of the Court which are to hear a particular case, or, more often, a particular series of cases. There are no fixed, published rules which the Chief Justice follows in making these assignments. An empirical study of the Supreme Courts divisions for its reported decisions from 1950 to 1964 does, however, reveal some general tendencies in the formation of these panels. We have already seen in Table 1b above that there is some degree of regional or provincial specialization in assigning judges to the provicncial lists. Now we might also detect some general principle at work in deciding whether a case should he heard by a five-judge panel or a large aggregation of judges.

In Table 1c we can see that the number of judges sitting for a case has depended, to some extent, on the kind of issue before the Court. In the commonplace cases where there has been no question of great national import at stake the Court has usually just met the quorum requirement. Thus we find that in the bulk of cases involving disputes between private parties based either on the common law or Quebec's Civil Code only five-judges have sat. The slightly higher percentage of common law cases in which more than five judges have sat may simply be the result of there

	5 Judges ¹	7 Judges ²	9 Judges ³
Civil Code Cases	.94	.03	.03
Common Law Cases	.87	.10	.03
Cases in which Gov't. a party (non-criminal)	.74	.14	.12
Criminal Cases	.59	.22	.19
Constitutional Cases	.11	.43	.45

Percentages of Different Types of Cases in Which 5, 7 and 9 Judges Have Sat (Based on Supreme Court's Reported Decisions, 1950-1964.)

Table 1c

1. Includes two cases with four judges.
2. Includes two cases with six judges.
3. Includes two cases with eight judges.

being relatively more common law jurists available for cases raising difficult issues relating to the common law. On the other hand, when a question relating to the interpretation of the B.N.A. Act has been before the Court, it has usually been heard by a larger Court, although contrary to some expressed opinions on this matter, the full Court has sat for less than half of the constitutional cases dealt with by the Court since 1949. Also in criminal cases and in other

cases involving government as one of the parties (either as a litigant or intervenor) there has been a greater tendency for the larger court to adjudicate the issue.

When we put together the Court's practice of using a five-judge court for cases involving the Civil Code with the high level of participation displayed by the Quebec judges in Quebec cases, we can see how the 1949 addition of one Quebec judge has led to the civilian members of the bench enjoying a majoritarian position in most appeals involving Quebec's Civil Code. In the last section of Chapter IV we shall take a closer look at the effects this change has had on the Quebec judges' influence in Quebec appeal cases. Here we wish to focus attention on the growing orientation of the Supreme Court's method of organization towards specialized divisions. This is most marked and no doubt most appropriate in relation to Quebec's distinctive system of private law. It would not require a very drastic reform of the Court to at least ensure that in any case in which the interpretation of Quebec's Civil Code was the central issue civilian jurists constitute a majority of the Court. The adoption of a statutory rule requiring the ad hoc appointment of a civilian jurist whenever in a case dealing essentially with Quebec's Civil Code it was impossible to provide a civilian majority from the Court's own personnel would only prevent the infrequent and accidental deviations from what has come to be the fairly

well-established practice of the Court.¹

We might note that there is already provision in the Supreme Court Act for the appointment of ad hoc judges.² Such appointments are made whenever there is not a quorum available for holding or continuing a session of the Court. Ad hoc judges must be appointed from the Exchequer Court or, if no Exchequer Court judge is available, from a provincial superior court. If the ad hoc judge is required for a case appealed from Quebec and less than two Quebec judges are available, the appointment must go to a member of the Quebec judiciary. These provisions, as they stand, were only meaningful when the Court's total membership was smaller and there was a real possibility that a quorum might be lacking during a session. With nine judges now belonging to the Court it is highly unlikely that there would ever be cause to appoint an ad hoc judge. However, the ad hoc mechanism

¹ This reform was suggested by Léon Lalande in "Audition des Appels de Québec à la Cour Suprême." 33 Canadian Bar Review (1955) 1104, at p. 1105. In Lalande's scheme the Chief Justice, or, in his absence, the senior puisne judge would decide whether such an ad hoc appointment should be made. A more drastic reform in the same direction would be to divide the Court, for at least private law matters, into Civil law and Common law chambers. This proposal was made by Professor Albert Mayrand in the article cited above page 80 , footnote 2 , at p. 2.

² S. 30.



could be used to guarantee a majority of civilian jurists for certain categories of Quebec appeals by means of the amendment outlined above. This approach to overcoming what many Quebec critics regard as the under-representation of civilian jurisprudence on the Supreme Court might be preferable to simply adding Quebec jurists to the permanent membership of the Court. The latter approach is likely to entail the appointment of additional Ontario judges as required by the political principle of Ontario-Quebec parity.

Of course, one might react to these statistics regarding the number of judges present for different types of cases in quite a different way and argue that far from increasing its tendency to sit in divisions the Supreme Court should sit as a plenum with all nine members bringing their wisdom and experience to bear upon each case which comes before the Court. This policy would surely only be possible and appropriate if the Supreme Court's jurisdiction were drastically changed so that only cases involving issues of major importance to the legal fabric of the nation were admitted to the Court's docket. Under existing legislation and practice the bulk of the cases which come before the court concern rather mundane questions of "lawyer's law" relating to controversies between private groups or individuals.¹ It would be difficult to contend that the final

¹See below, Table 3 for a statistical analysis of the Court's case load from 1950 to 1964.



resolution of these issues requires the attention of more than five judges. Also, given the lack of clerical and research assistance available to the Court's members and the length of time the Court permits for oral argument, sheer pressure of time makes some division of the work-load among the judges a necessity. Even if this situation is not basically altered and the Supreme Court does not follow the direction of the United States Supreme Court and become an essentially public law tribunal confining its energies to questions of national importance, it might at least be possible for the full court to sit for cases involving the interpretation of the Constitution. It would seem fitting that the Court's full membership, representing the country's main regional divisions and, hopefully, the highest reservoir of its juristic talent, be engaged in the exercise of what is undoubtedly the Court's most significant function, - the arbitration of the federal division of powers.¹

(v) The Chief Justiceship

'In recent years there has been some suggestion that the Chief Justiceship of the Supreme Court is one of those positions in the Canadian system of government which should be rotated among French and English-speaking incumbents. The last few appointments are consistent with this theory. Chief

¹Bora Laskin has strongly urged "That the full bench must sit in all constitutional cases and, perhaps, also in all capital cases." Above, page 68 , footnote 1 , p. 1044.



Justice Duff of British Columbia, was succeeded by Chief Justice Rinfret of Quebec in 1944. Chief Justice Kerwin of Ontario, took Rinfret's place in 1954 and was in turn succeeded by the present Chief Justice, Robert Taschereau, a Quebec jurist, in 1963. While these four appointments are consistent with a theory of French-English rotation, we should also note that in each case the Chief Justice at the time of his appointment was the senior (in terms of years of service) puisne judge on the Court's bench.

When we go back beyond the most recent four appointments we discover that there is no trace of a French-English rotation in the Chief Justiceship of the Court. Of the seven Chief Justices who preceded Sir Lyman Duff only two, Henri E. Taschereau and Sir Charles Fitzpatrick, were from Quebec. Seniority again appears to have been a more important qualification for the office of Chief Justice than ethnic origins, although even seniority does not provide a consistent thread to the series of appointments. The first three Chief Justices, Richards (1875), Ritchie (1879) and Strong (1892) were all members of the first Supreme Court in 1875. Along with Justice Jean Thomas Taschereau who retired very shortly after his appointment, they were the members of the original Court with previous judicial experience. Following the retirement of Chief Justice Strong in 1902, Henri Elzéar Taschereau became the first French Canadian to hold the position of Chief



Justice. It should be noted that at the time of his appointment Taschereau, was the Court's senior member. Chief Justice Taschereau was succeeded in 1906 by another Quebecer, Sir Charles Fitzpatrick who came to the Court, directly from the federal cabinet where he had held the post of Minister of Justice. This was the first and last time in the Supreme Court's history that a Chief Justice was not promoted from within the Court.¹ The seniority principle was, however, reasserted when Sir Louis Davies, of Prince Edward Island, succeeded Sir Charles Fitzpatrick in 1918. The appointment of the last Chief Justice to serve before Sir Lyman Duff represents the one other deviation from the seniority rule. When Justice Francis Anglin was appointed to succeed Sir Louis Davies in 1924, both Justice Idington and Justice Duff were senior to Anglin in terms of years of service on the Supreme Court.

The frequency with which the seniority principle has been observed in the selection of Chief Justices as compared with the relative infrequent following of the principle of French-English rotation, is perhaps a reflection of the general lack of importance associated with the position of Chief Justice on the Canadian Supreme Court. If the Chief Justice of Canada were as important a figure in the nation's

¹With the exception, of course, of the Court's first Chief Justice, Sir William Buell Richards, who, nevertheless, was Chief Justice of Ontario at the time of his appointment to the Chief Justiceship of the Supreme Court. Also there is some evidence to suggest that Prime Minister King considered appointing one of his cabinet colleagues to succeed Chief Justice Duff. See below: p.187.



governmental system as is either the Lord Chancellor in Great Britain or the Chief Justice of the United States there might have been more attention paid to the personal qualifications of the men selected for the position. That is not to say that the position is of no consequence at all. The Supreme Court Act does assign some special responsibilities and powers to the Chief Justice. He possesses the power to convene the Court at any time,¹ he has the right to appoint ad hoc judges² and he is responsible for arranging the Court's work load for a given session.³ He is also ex officio, the deputy Governor-General of Canada. But none of these attributes of the office reach nearly as far as those associated with the Chief Justiceship of the United States or the Lord Chancellorship in Great Britain.

The latter position is hardly comparable to the position of Chief Justice in Canada, for the Lord Chancellor while he is the ranking member of the country's final court of appeal, the House of Lords and the Judicial Committee of the Privy Council, at the same time is a member of the Cabinet and the head of a large department of state. The closer comparison is with the Chief Justice of the United States Supreme Court.

¹S. 34.

²S. 30 (1).

³S. 84.



In part the greater prestige and influence attaching to the office of Chief Justice in The United States result from the greater prominence the United States Supreme Court has achieved in the American governmental system.¹ But in addition to this, there is a very real contrast between the roles played by the American and Canadian Chief Justices in their respective Court's decision-making processes. A former clerk to Justice Black of the United States Supreme Court summarizing the source of the power wielded by that Court's Chief Justice has written that "(T)he two really meaningful functions of the Chief in relation to his brethren are his chairmanship of the Court's own conference . . . and his assignemnt of the writing of opinions."¹ This same statement could certainly not be made about the role of the Canadian Chief Justice. The Canadian Supreme Court has never followed the American practice of holding regular conferences of the full court in order to identify the main issues at stake in the decisions before the Court and to assign opinion-writing responsibilities especially for the majority positions in a case.² As we have seen more often than not the Canadian Court functions in divisions of five. And when the full Court does address its collective energies in a case of major importance, for instance a case concerning the interpretation of the

¹ John P. Frank, *Marble Palace* (New York: Knopf, 1958), p. 75.

² See below, section 2, subsection (i)(c) of this Chapter for a more detailed account of the Supreme Court's conference system.



Constitution, there is no evidence that the Chief Justice even on these occasions tries in conference to lead the Court towards clarifying the issues at stake or identifying the Court's main divisions. Some of the Court's most important constitutional decisions have produced nine separate opinions with several on the majority side none of which were designated as the opinion of the Court.

In a word the Canadian Chief Justice has not been in any meaningful sense a leader of the Court. Some like Chief Justice Duff have by virtue of their superior ability and energy at certain times been able to command the respect and allegiance of their colleagues, but none have developed the institutional or procedural devices whereby in a deliberate and consistent way they might exercise leadership in the Court's adjudicative process.

In concluding this discussion of the Chief Justiceship we should note that the real difference in the power exercised by the United States Chief Justice as compared with his Canadian counterpart does not depend on any great difference in their legal capacities. It is certainly legally possible for a Canadian Chief Justice to develop conference and opinion-writing practices which would make his position more analogous with that of the American Chief Justice. If this were to occur and was accompanied by a general increase in the prominence of the Supreme Court in the Canadian system of government, then the demand for a bicultural rotation of the position of Chief Justice might acquire much greater urgency.



(vi) Other Factors Affecting Appointments to the Supreme Court

Thus far we have examined only the very overt legal and conventional factors affecting the composition of the Supreme Court. Behind these factors a network of more covert and possibly more decisive influence are at work in the process of selecting Supreme Court Judges. We are forced of course to acknowledge the possibility that such influences might exist once we recognize the political character of the appointing authority - the federal government. It would go beyond the scope of this study to attempt a comprehensive analysis of the considerations and pressures which have been operative in shaping the choices made by federal politicians in filling Supreme Court vacancies. Still to ignore even some general reference to these factors would be to overlook some of the most distinguishing characteristics of the Supreme Court's membership. It is essential to at least have a glimpse at the way in which the existing system of selection has tended to increase the likelihood that certain kinds of lawyers from both French and English-speaking Canada will occupy positions on the Supreme Court Bench.

Generalizations in this area are difficult to make. In a sense each appointment to the Court is the result of a unique set of transactions.¹ Yet there are some general

¹For an exhaustive documented analysis of all the forces at work in the process of appointing one United States Supreme Court Justice see, David J. Danelski, A Supreme Court Judge is Appointed, (Random House, 1964). In Canada there has been no documented investigation of federal judicial appointments.



factors influencing the selection of the Supreme Court judges which can be gleaned from surveying the barest biographical data on the 49 men who have been appointed to the Court since its establishment in 1875.¹

The most obvious point which this biographical data reveals is that there are two career patterns which are most apt to lead to the Supreme Court - politics and the federally-appointed judiciary. Of the 49 lawyers who have served on the Court only 10 had not previously either been members of a federal or provincial legislature or else members of the bench of a provincial superior court.² And even among the ten exceptions, two, Sedgwick and Newcombe, served as Deputy Ministers of Justice in Ottawa, which would bring them well within the inner circle of federal legal influentials. We should further note a considerable amount of overlap between those who were promoted from the provincial courts and those who had been actively engaged in party politics: 11 of the 27 Supreme Court judges who rose from provincial courts had, before their appointments to the provincial court, been either federal M.P.'s or provincial

¹ The biographical data used here was extracted from the short biographical notes on each Supreme Court judge available in the Supreme Court library.

² The 10 exceptions were Justices Sedgwick, Nesbit, Mignault, Newcombe, Hughes, Locke, Cartwright, Nolan, Martland and Ritchie.

M.P.P.'s.

It is interesting to observe that more than half of the 23 judges who had at one time or another been elected politicians, held very prominent governmental positions. Most frequently their positions were closely associated with the administration of justice at either the provincial or federal level: six of the judges had held the post of Attorney General in a province;¹ three others had been federal Ministers of Justice.² The latter trio are particularly interesting in as much as the federal Minister of Justice is, of course, the cabinet minister directly responsible for advising the Prime Minister and Cabinet on the selection of federal judges. Two of these ex-ministers of Justice, Mills and Fitzpatrick went directly from the Ministry of Justice to the Supreme Court.³ In addition to these three Ministers of Justice, three other appointments went to the senior federal cabinet ministers.⁴ Finally, two appointees had been Provincial Premiers.⁵

¹ Chief Justice Richards (Ont.), Justices Henry (N.S.), King (N.B.), Lamont (Sask.), Rand (N.B.) and Estey (Sask.).

² Justices Fournier and Mills and Chief Justice Fitzpatrick.

³ Justice Fournier exchanged the Justice portfolio for that of Postmaster-General a few months before his elevation to the bench.

⁴ Justice Davies (Minister of Marine and Fisheries), Justice Brodeur (Speaker, Minister of Internal Revenue, Minister of Fisheries) and Justice Abbott (Minister of Finance).

⁵ Justice Davies (P.E.I.) and Justice King (N.B.).



There has been a tendency for the pattern of "political" appointments to vary regionally, among the parties and over time. Most of the judges who had previously been prominent in politics have come from the Atlantic Provinces and Quebec: six of the eight judges from the Maritimes and nine of Quebec's thirteen appointees had been elected to provincial or federal legislatures, whereas only four of the Western provinces' nine judges and four of Ontario's nineteen had earlier political careers. Also, of this group of judges with a prominent political background, far more were appointed by Liberal than by Conservative administrators. All but one of the dozen political notables referred to in the preceding paragraph were Liberal appointments.¹ In some respects this situation is analogous to that which exists in the Canadian Senate, where the greater number of years during which the Liberal Party has held power nationally has meant a long-run Liberal preponderance in the Senate's political composition. However, in the case of Supreme Court appointments the Liberals enjoyed the extra advantage of having been in power at the time of the Court's establishment.² But it should be noted that in contrast to Senatorial appointments, Supreme Court appointments have often

¹The one exception was Justice King, a Conservative appointment.

²For an account of the political character of the MacKenzie government's first appointments, see above pp. 45-46.

gone to jurists who have had no strong political affiliations at all and even on occasion to persons active in the party opposite to that of the appointing government¹ (although, as is the tendency with appointments to the Senate, no lawyer who has been an active member of one of the minor or "third" parties has ever been appointed to the Supreme Court.)

Finally we must draw attention to what might now be regarded as the most significant development in the appointment of political notables - that is the marked decline of such appointments in recent years. Of the nine appointments made since the end of World War II, only one (the appointment of Douglas Abbott, the Liberal Minister of Finance, in 1954) went to a person who had been at all prominent in politics.² Indeed, prior to Abbott's appointment the most recent example of a federal government elevating one of its own members to the Supreme Court bench was the appointment

¹ A case in point was the appointment of Justice Locke in 1947. Under the headline "MR. KING NAMES B.C. TORY TO CANADA SUPREME COURT". Robert Taylor in the Toronto Daily Star reported that: "The new judge was one of the most prominent Progressive Conservatives in his home city of Vancouver and his selection by the King government caused some stir. Cabinet sources in Ottawa explained that there is in Canada such a limited number of qualified men available for such high posts that seldom does the political faith of an appointee enter into the question of his selection." Toronto Daily Star, June, 1947.

² A few of these appointees, however, were known to have had close connections with federal political leaders.



of Louis Brodeur, Minister of Fisheries, in 1911. One of the positive aspects of this trend has been the selection of persons whose background is distinguished more by academic than political activity. Five of the fourteen judges appointed since 1940 had been active in teaching at Canadian law schools;¹ whereas before this time only two judges are listed as having held academic appointments.² Of course, in part this change must be a reflection of the greatly expanded role which the university law schools over the last few decades has come to play in the Canadian legal community. But it seems likely that this recent trend towards a greater recognition of academic talent, as well as the apparent downgrading of political prominence in favour of a greater emphasis on professional accomplishments, is also in part a reaction to the growing stream of criticism directed against the political nature of judicial appointments in Canada.³

¹ The present Chief Justice, Taschereau, was Professor of Criminal Law at Laval University from 1929-1940 (from 1930-1940 he was also a Liberal member for Bellechasse in the Quebec Legislative Assembly); Justice Estey lectured in law at the University of Saskatchewan; Justice Fauteux was Professor of Criminal Law at McGill from 1936 to 1950; Justice Martland had been a Professor in the University of Alberta's Law Faculty; Justice Ritchie was a lecturer in the Dalhousie Law School from 1947 to 1939.

² Justice Mills had held the chair of constitutional and international law at the University of Toronto; Chief Justice Rinfret was for 10 years a Professor at McGill Law School.

³ These criticisms are well summarized by Professor William Angus in a recent article in Chitty's Law Journal reprinted in the Toronto Globe and Mail, October 22, 1965 under the title "Seeking a Way to Find Better Judges."



In setting out the principal parameters of Supreme Court appointments our purpose has been to reveal the rather narrow range of legal talents and interests which federal governments have drawn upon in staffing the Supreme Court. Even when we allow for the broader criteria of selection which appear to have been operative in recent appointments we must conclude that over the years the bulk of appointments have gone to a rather small circle of lawyers and judges who by virtue of their formal political activity or service to the administration of justice, or both, were well known to the federal politicians who ultimately made the selections. It is unrealistic to expect this tendency to be abandoned so long as the power of appointment rests exclusively in the hands of the federal government. A 1940 entry in the diary of Prime Minister King reveals how natural it may become for a Prime Minister to look upon his political lieutenants as the most logical candidates for the Supreme Court bench. King records that "Lapointe mentioned . . . that Ralston had his heart set on the Supreme Court, and I agreed we should make him Chief Justice when Duff's time to retire comes. Lapointe himself might have pressed for that post had he been other than the unselfish man that he is."¹

¹Quoted in J.W. Pickersgill, The MacKenzie King Record (University of Toronto Press, 1960) p. 75.

The worrisome point about this disclosure is not that either Justice Minister Lapointe or Finance Minister Ralston were undeserving of consideration for the Supreme Court. What is disturbing is the easy monopoly of power in determining high judicial appointments which the quotation indicates may be exercised at the apex of the federal political establishment.

This situation may have several adverse effects on the Supreme Court. In the first place the political basis of Supreme Court appointments may weaken the Court's capacity for acting as an effective arbiter of Canada's federal system. Besides the general loss of prestige and respect which a court incurs as a consequence of partisan appointments to its bench there is the particular danger in the case of the Supreme Court that the federal source of the patronage involved in selecting its judges might undermine the confidence of provincial interests in the Supreme Court's impartiality in adjudicating dominion-provincial disputes. There may be, as we suggested in Chapter II, little if any real evidence of a centralist bias in the Supreme Court's constitutional decisions.¹ Nevertheless, the complete dependence of the Court on the federal level of government remains a source of provincial suspicion. This suspicion is hardly alleviated by a series of appointments which suggest that the federal government has frequently favoured its

¹ See above, pages 121-122.

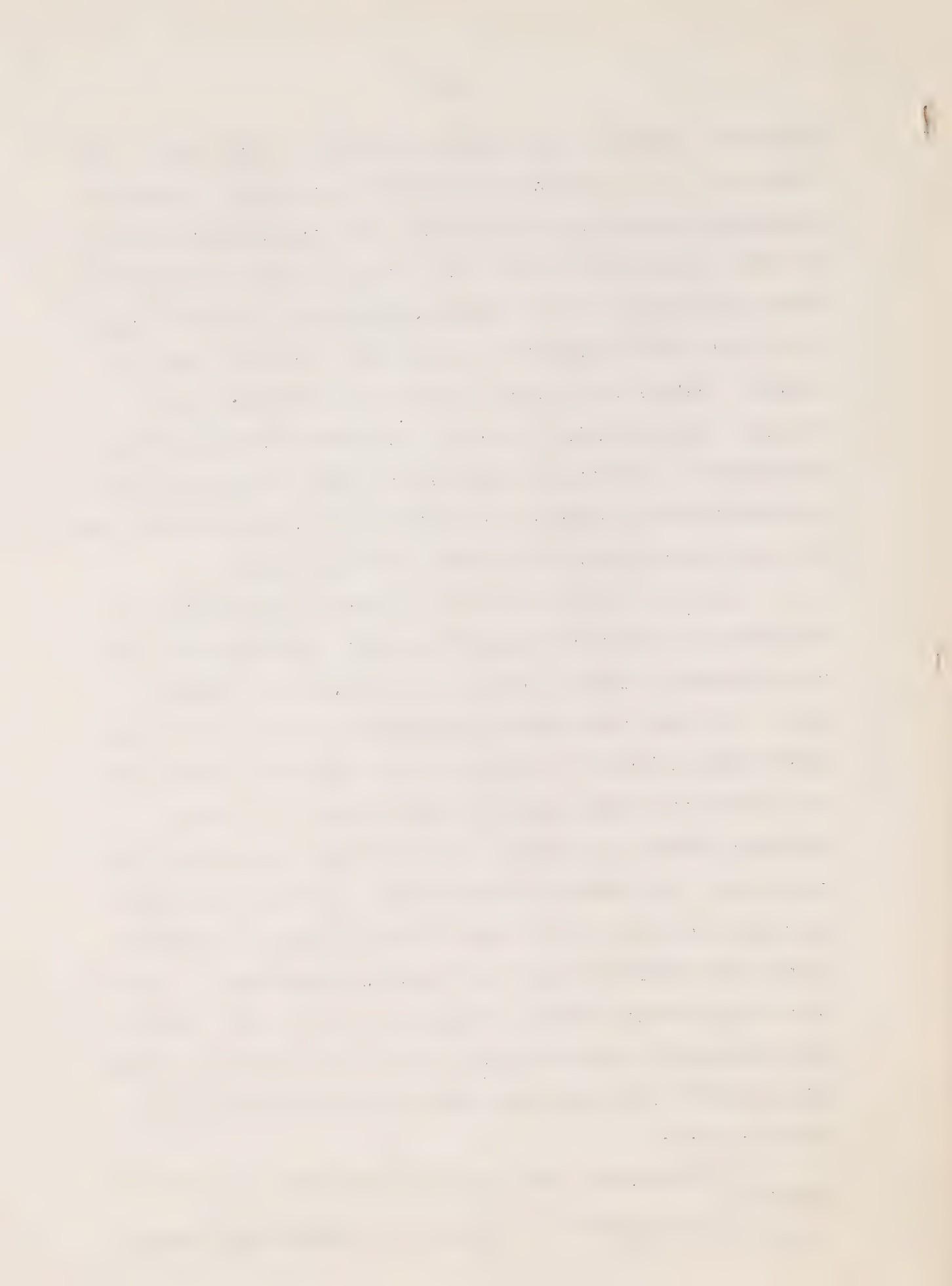


political supporters in filling vacancies on the Court. On this point it is relevant to observe that while a number of prominent federal politicians have been transferred directly to the Supreme Court bench, all but one of those members of the Court who were once active in provincial politics¹ had left their provincial posts some years - in most cases a decade - before their appointment to the Supreme Court. Clearly the provincial political interests which might be consulted in selecting a judge from a particular province or region will ~~most likely~~ be those within the provincial wing of the federal party which holds national power.

It is a further source of concern that political considerations may have greatly limited the search for the most promising judicial talent in staffing the Supreme Court. Without any narrow partisanship on the part of the appointing authority the field of distinguished lawyers who are likely to accept judicial appointments is already severely limited in Canada. As O.M. Biggar pointed out some years ago, "the problem of recruiting the Bench is a very much more serious one in Canada than in England, by reason both of the greater hesitation possible appointees in Canada have in accepting offers of appointment and of the greater difficulties the appointing authority has to meet in making selections."² This point has serious implications for the

¹ The present Chief Justice, Taschereau, is the one exception.

²"The Selection of Judges," 11 Canadian Bar Review (1933) 27, p. 39.



Supreme Court, for in addition to the general reluctance of outstanding Canadian lawyers to take judicial appointments, it seems clear that the Supreme Court, unlike the highest courts of both the United Kingdom and the United States has not acquired the preeminence which might make a place on its bench a logical goal for the most talented members of the country's legal profession. What ever the reasons for the relative unattractiveness of the bench in Canada,¹ it is surely clear that the country can ill afford to further restrict the jurists available for manning its highest tribunal by limiting the selection to those who have political connections with the party in power.

To fully understand the possible shortcomings of the existing appointment system we must remember that in Canada the federal government is responsible for appointments to virtually all the senior positions in the Canadian judiciary. In addition to its power of appointing the members

¹ Besides Biggar's article cited above two other articles explore some of the reasons: Mr. Justice Trueman, "Judicial Appointments" 8 Canadian Bar Review (1930) 11; editorial in 12 Fortnightly Law Journal (1942) 65. Salaries are usually cited among the reasons for lawyers' reluctance to accept judicial appointments. Although with the present Supreme Court salary schedule of \$35,000 for the Chief Justice and \$30,000 for the puisne judges (compared with £12,000 for the Lord Chancellor and £9,000 for Lord of Appeal in Ordinary in Great Britain; £10,000 and £8,500 for the Chief Justice and High Court Justices respectively in Australia; and \$40,000 and \$39,500 for the Chief Justice and Associate Justices respectively in the U.S.A.) it would seem unlikely that salaries are a major factor in lawyers' refusal to accept Supreme Court appointments, or, if they are, then they perhaps discourage lawyers who are not by temperament well suited for service on the nation's highest judicial tribunal.

of "federal" courts such as the Supreme and Exchequer Courts it also possesses under section 96 of the B.N.A. Act the power of appointing the judges of the Superior, District and County Courts in each province. This means that candidates for all of the principal positions in the provincial judiciaries must pass through the same political screen as those considered for Supreme Court appointments. Granted that in selecting provincial judges there may be more opportunity for consultation with local professional and political groups, nevertheless the web of political interests imposed upon this selection process will primarily emanate from the federal political party in power. This point should be borne in mind in assessing the significance of the fact that 27 of the 49 Supreme Court appointments went to provincial judges; all of these judges had previously been selected by the federal government for the provincial bench, and indeed, as we have noted above, 11 of these persons had been active participants in the political arena.

In Chapter II we examined the federalist concern over the central government's monopoly in the field of judicial appointments. We can now see that the extent to which federal political patronage has entered into the federal government's exercise of its power provides further substance for that concern. It may be that the federalist concern can now indicate one of the most promising avenues of reform: the participation of provincial governments in

judicial appointments.

The usual approach to reform in this area is to call for some arrangement which would enable representatives of the professional bar associations to nominate the lawyers from which the federal cabinet would select judges. Already there has been considerable progress in this direction. Representatives of the local bar have been consulted on many judicial appointments, (although their advice certainly has not always been followed!). Recently there has been some indication that the government is prepared to formalize this process of professional consultations: the Minister of Justice is reported as saying "it would be a valuable step if various provincial bar associations would voluntarily send in regular panels of names of lawyers who would make good judges, regardless of political application."¹ But even the broadening and institutionalization of this system of professional nominations, will still leave the federal cabinet with a monopoly power of final selection.

Thus it may be that, in addition to establishing a more formalized procedure of professional nominations, what is required for providing some real improvement in the quality of judicial appointments is a bifurcation of the appointing power. It might at least become less possible for uninspired or partisan judicial appointments by the federal governments to pass relatively unnoticed if they could be compared unfavourably with judicial appointments made by

¹Quoted in William Argus, "Seeking a Way to Find Better Judges", above page 186 , footnote 3.

provincial administrations. As it is now, with only one stream of appointments issuing from one appointing agency, no such comparisons are possible. No doubt, if the provinces took over responsibility for appointing Section 96 judges, or, on a rotational basis, shared in the selection of Supreme Court judges, they too might be subject to partisan political considerations in making their selections. But at least this would represent a broadening of the political and social interests which are now influential in selecting Canadian judges. Also, the partisanship exercised by a provincial government in appointing provincial judges is likely to be far more vulnerable to public scrutiny than is the existing federal partisanship in judicial appointments.

We have not examined here other non-legal factors which may affect the selection of Supreme Court justices. It is often suggested, for example, that the federal government tries to maintain some religious balance between Protestants and Catholics on the Court or a balance between the Quebec City and Montreal divisions of the Quebec bar. But there is no evidence of any consistent representational patterns in these and other areas. Even with regard to religious considerations, about all the record of past appointments entitles us to say is that there has usually been a Catholic judge from outside Quebec on the Court.¹

¹For example, Justice Hall, a Catholic, was appointed just prior to the retirement of Chief Justice Kerwin who had been, until Hall's appointment, the only non-Quebec Catholic on the Court.

Given the political considerations which impinge on the appointing process, it is likely that in filling any given vacancy on the Court, the government might use the opportunity to patronize some regional, religious or ethnic¹ component of its political base.

It may seem that we have wandered far from our main concern with the bicultural and bilingual capacities of the Court in this examination of the non-legal factors affecting the Court's composition. But these factors have an immediate bearing on the quality of the Court and the respect which it inspires from the Canadian people. Whatever else the Court must have if it is to act creatively and effectively as the highest tribunal for a bilingual and bicultural society it must be staffed by jurists of the highest calibre. Of course, there will inevitably be some room for disagreement as to the requisite qualities of a Supreme Court justice. Certainly there is a case for having both former politicians and former lower court judges on the Supreme Court bench. The former can enrich the Court's outlook with a broad awareness of the social context to which the law must be adapted and a sensitivity to the policy interests of different levels of government, the latter can bring to the Court a mature approach to adjudicative problems ripened by years of experience on the bench.

¹ Although to date the only ethnic divisions of the population represented on the Court have been, the French and Anglo-Saxon.

But the strength and merit of the Court's bench is threatened when the choice of politicians or lower court judges is influenced by the partisan considerations of the dominant federal political party. Surely any programme which aims at increasing the Court's capacity for acting bilingually or for imaginatively directing the mutual development and interaction of the common law and civil law systems is likely to be abortive unless it comes to grips with the problem of designing a method of selection which is more likely to bring the appropriate talents to the Supreme Court's bench.

(vii) The Supreme Court's Non-judicial Staff.

In our examination of the bilingual and bicultural capacities of the Supreme Court's administrative staff we did not find any serious shortcomings. The two most important posts on the administrative side of the Court are those of the Registrar and Deputy Registrar. The Registrar, assisted by the Deputy Registrar is responsible for supervising the work of all the officers, clerks and employees appointed to the Court, the Court's library as well as the reporting and publication of the Court's judgments.¹ While there is no statutory rule that these two senior officials must come from Canada's two major ethnic divisions, this is presently the case with the Registrar being an English-speaking and the

¹Supreme Court Act, above page 105, footnote 2,
Sections 15-17.

Deputy Registrar a French-speaking lawyer. M. des Rivières the Deputy Registrar who also acts as one of the editors of the Official Reports of the Court,¹ is completely bilingual. The Registrar, Mr. K.J. Matheson, while not fluent in French is certainly able to correspond and converse in French when conducting Court business.

The clerks who work in the Registrar's office are the employees with whom lawyers most frequently have contact when bringing a case before the Court. At the present time these clerks are all persons whose first language is French but who are completely bilingual. Also the Court is served by four bilingual messengers. The Supreme Court Library, which incidentally now has a very impressive collection of French legal materials, has a common law, English-speaking librarian, Mr. B. Grearson and a civil law, French-speaking librarian, M.R. Boulte. A number of library clerks, some of whom are bilingual, work under the direction of these two librarians.

Each judge has a private secretary who usually speaks the same language as the judge she serves. These secretaries carry out stenographic responsibilities; their work in no way resembles that of the law clerks attached to justices in the senior American Courts. Only the Chief Justice, has, in the person of Mr. Campbell, Administrative Secretary to the Court, an assistant who comes even close to performing some of the duties carried out by law clerks in

¹The other editor is Mr. Mills Shipley.

²Note that both the Chief Justice of the High Court of Ontario and the Chief Justice of Ontario now have law-clerks.

the United States. A number of justices now serving on the Court have expressed the view that the Court might be much more capable of devoting more individual reflection and collective deliberation to each case if its members were assisted by competent law clerks in carrying out research and preparing preliminary analyses of cases.¹ Further, a French-speaking civilian law clerk might be of great assistance in helping an English-speaking common law judge prepare himself for adjudicating a Civil Code case presented in French. The appointment of law clerks, by reducing the burden of research and preparation of opinions now imposed on each judge would have the further advantage of enabling the full court to sit for a large number, if not all, of the important cases which come before it.

2. Bilingualism in the Court's Procedures

Section 133 of the British North America Act states that either the English or the French language "may be used by any Person or in any Pleading or Process in or issuing from any Court of Canada established under this Act, ...". This Section clearly establishes the right of any litigant to use either French or English in pleading his case before the Supreme Court of Canada. But it is one thing to grant individuals a right, and quite a different thing for the

¹ Although it is true that high court judges in the United Kingdom do not have law clerks, the law reporters there have very extensive responsibilities in preparing opinions for final publication. For a recent comparison of the work of law clerks and law reporters by a team of Anglo-American jurists see Delmar Karlen, Appellate Courts in the United States and England (New York Univ. Press, 1963) pp. 145-6.

public authorities who are legally bound to recognize such rights to positively create an environment in which these rights can be most effectively exercised. While there has never been any suggestion that English-speaking persons have had difficulty in enjoying their linguistic rights in the Supreme Court, French-speaking Canadians have complained that the situation in the Court is such that a French-speaking counsel is often seriously handicapped if he decides to exercise the right to use his first language when pleading cases before the court.¹

We have already seen the chief grounds of this complaint in our examination of the linguistic capabilities of the Court's personnel: some (on some courts all) of the English-speaking judges on the Court are not thoroughly bilingual and these judges are often present when French-speaking counsel present their case to the Court. In this section we wish to push our analysis a stage further and try to ascertain in which parts of the Court's proceedings the failure of judges to be bilingual might be most significant. This should provide a better basis on which to assess the seriousness of the linguistic short-comings of the Court's personnel. We might also be able to point out

¹This particular complaint was heard much more in the Court's earliest years. See, above, pp. 53-55. In recent years it has been heard again as one of the specific grounds for French-Canadian discontent with federal institutions. See, above, pp. 132-136.

possible means of compensating for any linguistic deficiencies by some adjustment in the Court's method of conducting its business. These suggestions, for the most part, will be alternatives to the more direct approach to the bilingual problem which would be to ensure that only judges thoroughly proficient in French dealt with cases in which lawyers chose to conduct their case in French.

Besides exploring the bilingual implications of the Court's proceedings we are also interested in describing the general style of the Court's adjudicative method. Although this part of our inquiry is not uniquely relevant to the Court's bilingual and bicultural dimensions, it should throw light on the Court's general ability to perform any of its major functions, including those which might be considered relevant to the Court's impact on bicultural or bilingual values.

Our approach in this section will be to look first at the main stages through which a case passes when adjudicated by the Supreme Court, paying special attention to the extent to which the rules or practice governing any stage provide for bilingualism. We shall then report the results of a questionnaire which we administered to French-speaking counsel eliciting their opinions of the language situation in the Supreme Court.

i) Principal Stages in the Supreme Court's Proceedings

It is not an easy task to set out with any degree of

precision the most significant aspects of the Supreme Court's adjudicative method. A leading student of the Court has said that, "(I)ts system is characterized by freedom from system."¹ The Supreme Court Act and the Rules of the Supreme Court² establish some of the organizational and procedural principles which Court practice must follow but they do not provide a very complete picture of the Court's administrative system. There are several scholars who on the basis of observation and conjecture have tried to give a more adequate description of the Court's methods.³ We have augmented these sources of information by interviewing those judges who are currently serving on the Court as well as the Court's principal administrative officers the Registrar and Deputy Registrar.⁴

¹ Bora Laskin, above, page 68, footnote 1, p. 1043.

² The Supreme Court Act in s.103 authorizes the judges of the Court (or any five of them) to make the Rules. The Act and the Rules are published together in bound form by the Queen's Printer (1961). The Act and Rules are printed in both languages in this volume.

³ To date the most thorough, published account of the Supreme Court's methods of adjudication is contained in the article by Bora Laskin cited in the preceding footnote. We have also been greatly assisted by Professor Albert Abel's comparative study of procedures in the highest appellate courts of Great Britain, Canada and the United States. This is part of a work which is still in manuscript form, but is due to be published in the very near future.

⁴ We would like to record here our very deep appreciation for the friendly and helpful cooperation which we received from the Chief Justice, his fellow judges, the Registrar and Deputy Registrar in carrying out this study of the Court's operations. We hope that whatever is presented here by way of description is consistent with the explanations of the Court's methods which they offered us. Our assessment of these methods is, of course, our own.

(a) Written Presentations

In each appeal case which comes before the Court two written documents must be filed with the Court. First, the appellant is required by the Supreme Court Act¹ and Rules² to provide a record of the proceedings and reasons for judgment in the courts below. This document is known as the "case." Twenty copies of the case must be deposited with the Registrar³ for use of the Court and three copies must be sent to the solicitors for the other parties in the case. Secondly both the appellant and respondent must present a "factum" in which they set out the main points in their respective arguments.⁴ Each side must deposit twenty copies of its factum with the Court.⁵ It is only after each side has deposited its factum with the court that the parties exchange factums, thus presenting any opportunity for the respondent to reply in his factum to new points raised by the appellant on appeal.⁶

¹ R.S.C. 1952, C.259 S.67.

² Rules 6 to 13.

³ Thirty copies must be deposited in a Reference Case.

⁴ Rules 29 to 36.

⁵ Thirty copies must be deposited in a Reference case.

⁶ For a critical analysis of this practice see F. Heaps, "Factums in the Supreme Court of Canada" 15 Canadian Bar Review (1937) 561.

The language in which the "case" is presented will depend entirely on the language or languages used in the proceedings below. If the appeal is from Quebec it is likely that most of the proceedings, evidence, exhibits and lower court judgments will have been in French. However, where a litigant or judge below was English, there will be a certain amount of English-language material in the case. The language of the factums will depend on the choice of lawyers representing the parties in the case. We shall examine below the factors which appear to have influenced French-speaking counsel in deciding whether to write their arguments in French or English. What we should note here is that in Quebec appeals factums are now written about as often in English as they are in French. If we take all the Quebec appeals which the Court heard from the beginning of the January Term, 1963 until we completed our research in 1965 we find almost an equal division of French and English factums.¹ In 25 of the 73 cases both sides presented factums in English, in 24 cases both factums were in French and in the remaining 24 one side wrote its factum in English, the other in French. This even balance in the use of the two languages in writing factums clearly does not coincide with the high percentage of persons among the Quebec population

¹These figures are based on a list of Quebec cases prepared for this study by Mr. K. Matheson, the Supreme Court Registrar.

whose first language is French as well as the percentage of French-speaking persons among the Quebec lawyers and litigants coming before the Supreme Court. Certainly there are numerous examples of lawyers whose first language is French choosing to present their factums in English.

Under the present system no translations of either the cases or the factums are made for the Supreme Court judges. This is a change from at least the Rules in force earlier in the Court's history. According to the Court's original Rules, any judge could have a factum or judgment below "translated into the language with which such judge is most familiar."¹ These translations were to be carried out under the supervision of the Registrar, at the expense of the litigant whose factum was to be translated, or, in the case of the judgment below, at the expense of the appellant. This provision for a translation when requested by a judge was omitted when the Rules were last revised in 1945. The principal explanation for this change offered by the Court's officials is that with the great improvement in the English-speaking justices' facility in French, the Rule had fallen into disuse. Moreover it might also have been thought that a translation service tends to

¹ Rules 64 and 65. These rules are printed in Robert Cassels, (ed.) Manual of Procedure in the Supreme and Exchequer Courts of Canada, (Toronto: R. Carswell, 1877) pp. 179-202.

inhibit the development of true bilingualism on the part of those who avail themselves of it. Added to this is the great difficulty translators encounter in trying to find accurate English equivalents for French legal terms and vice versa. Finally, a system in which English-speaking judges would be responsible for imposing on French-speaking litigants the considerable expense of providing translations might have been embarrassing to the judges if not galling to the litigants.¹

The quality and length of the factum as well as the use made of it by the Court will to some extent depend on the lawyer who prepares it and the complexity of the case. But still, as a general rule, it is true to say that the factum plays a far less significant role in the Supreme Court's decision-making system than does the "brief" in the United States Supreme Court system. While briefs in the American system serve the same general purpose as the Canadian factums, (marshalling the main points of argument for each side) not only are they more extensive and, on the whole, more carefully prepared but also they are taken more seriously by both judges and lawyers. The

¹ Note that in the International Court of Justice at Le Hague the Registrar prepares unofficial translations of materials for the use of the Court and the parties when the parties elect to plead in different languages. But this is mainly for the benefit of the parties, for the Court's judges are expected to be familiar with the Court's two official languages--French and English. See article 39 of the Statute establishing the Court and discussion of it in Shabtai Rosenne, The International Court of Justice, (Leyden, A.W. Sythoff, 1957) p. 122.

appellant's brief is served on the respondent well before oral argument, and the respondent's answering brief is served on the appellant again well before oral argument. In some cases the appellant may serve a reply brief. In the Court the briefs are used by the judges to analyze the central issues in the cases and prepare themselves for oral argument. Indeed in some instances the Court has dispensed with oral argument completely, deciding the case entirely on the basis of the brief. But in contrast to this, oral argument is by far the most important stage in the Supreme Court of Canada's decision-making process. Often (one might even say usually) the factums are not thoroughly read or researched by the judges before hearing an oral argument. They may be used by the judges in following counsel's oral argument, but the main documents consulted by the judges before the oral argument are the judgments in the Court below and a summary of these will often be prepared for the bench before bearing a case. In this respect the adjudicative style of the Supreme Court of Canada comes much closer to that which characterizes the highest appellate courts in England, where no briefs or factums are filed at all¹, and aside from a short six or seven page written summary of the main issues in the case, the court relies

¹Note, however, that briefs were usually prepared for the Judicial Committee of the Privy Council.

entirely on oral argument in deciding a case.¹

The Supreme Court has gone further than the Privy Council in requesting counsel in every case to systematically set out in writing their main points of argument but it has not yet adjusted the mode of operation to make full use of the material which might be made available to the Court in the form of factums. In the United States justices are assisted by law-clerks in studying and organizing the material presented in briefs. Without any such assistance Canadian Supreme Court judges are not likely to be in a position to carry out an extensive examination of the written documents submitted for a case prior to oral argument. In a given two-month session a judge may be called on to sit for twenty-five to thirty cases in each of which there will be a copy of the proceedings below (the "case") running to usually well over a 100 pages and two factums that might be anywhere from 25 to several hundred pages each in length.² When we bear in mind that the Court's generosity in the length of time it permits for oral argument means that the judges will spend

¹ For a very thorough and authoritative comparison of the procedures followed in American and British appellate courts see Delmar Karlan, Appellate Courts in the United States and England, (New York University, 1963).

² But the Supreme Court has shown some hostility to factums which are of inordinate length. In Saumur v. Quebec and A.-G. Que. [1953] 2 S.C.R. 299, the Jehovah's Witness's lawyer prepared a 2 volume brief running to 912 pages. Although the Court allowed Saumur's appeal, Chief Justice Kerwin ruled that the appellant was not entitled to the costs of preparing his factum.

a large part of their time during a session on the bench, it is clear that they will have relatively little time in their chambers to adequately explore the authorities and analyze the factual contentions presented in factums. Without belittling the knowledgeable and conscientious assistance of the Court's librarians, which is now the only "research" assistance available to the judges, it seems clear that the Court will not be able to satisfactorily mine the written materials submitted to the Court unless its members are assisted by professional law-clerks. Where common law judges who are less than thoroughly bilingual or expert in Quebec's civil law system are called upon to hear Quebec appeals, presented in French, they might well stand in need of some preliminary study of the case before hearing oral agreements. Here, as we suggested above, a very strong case could be made for attaching bilingual civilian lawyers, as law-clerks, to common law, English-speaking judges. There might also be some merit in providing Quebec judges with the assistance of common law law-clerks. This might be a far more effective way than formal translations of ensuring that judges understand the written materials regardless of the language in which they are written. It has the further advantage of imposing the cost of compensating for the linguistic inadequacies of the Court's personnel on the Court rather than on the litigant.

One further point should be stressed in relation to

the role of factums. If the preparation of factums by counsel and their study by judges became a far more central part of the Supreme Court's decision-making system, this would undoubtedly shift the general character of the Court's adjudicative style further away from that of a normal court room trial to something much closer to that of a legal policy-making seminar. A team of English and American judges, lawyers and law professors recently concluded their comparative analysis of their two countries' system of appellate courts by emphasizing this basic contrast in the conception of their role held by English and American judges.¹ Whereas in England,

Appellate judges tend to regard their job as complete when they reach a correct conclusion on the case presented to them.

the work of the highest American judges

sometimes seems more akin to that of research scholars than that of trial judges. Insofar as they deal with constitutional problems, they are dealing with matters beyond even the reach of ordinary legislative processes. Insofar as they deal with statutory or common-law problems, many judges conceive it to be their duty to reform rules that they consider unjust or obsolete. They place greater stress on their lawmaking functions than do their English cousins, being at least as interested in laying down guidelines for the future as in deciding correctly the cases before them.²

¹ It is this study which served as the basis for Delmar Karlen's Appellate Courts in the United States and England. See above page 197 , footnote 1.

² Delmar Karlen, pp. 156-8.

While their tradition and education may naturally incline the Canadian Supreme Court's bar and bench more towards the English than the American model, the responsibilities imposed on them by the country's constitutional and legal system may make it appropriate for them to move more in the direction of American practice. Charged with the task of being the final arbiters of the written constitution, the Court's members are, whether they like it or not, unlike their English colleagues involved in an area of adjudication where their decisions have large policy implications for the whole nation and are not easily reversible by elected legislators. Moreover the Reference case procedure which is frequently resorted to by both levels of government in Canada brings major constitutional questions before the Court more in the form of general problems or questions for scholarly inquiry than in the form of carefully defined points in argument for a particular cause.¹ Finally, the responsibility of mastering the basic tenets of Canada's two legal traditions--the English common law and the French civil law--challenges the Court's resources for scholarship and reflection. In this context it may well be incumbent on the Court to adopt practices which enable its judges to devote

¹ For discussion of the Reference case in the Canadian legal system see J.A.G. Grant, "Judicial Review in Canada: Procedural Aspects," 42 Canadian Bar Review (1964) 195 and G. Rubin, "The Nature, Use and Effect of Reference Cases in Canadian Constitutional Law," 6 McGill Law Journal, (1959-60), 168.

more of their time and energies to their own investigation of the legal and factual materials bearing upon a case even if this is at the expense of time spent following counsel's oral pleadings in the court room.¹

(b) Oral Argument

As with so many dimensions of the Canadian Supreme Court, the role of oral argument can be best understood by keeping in mind the middle ground which Supreme Court practice occupies between that of American and British appellate courts. If anything the Canadian Court leans a little more towards the practice of the highest English courts than that of the American appellate courts in the emphasis which it places on oral argument. In contrast to the United States Supreme Court where normally each side is permitted only one hour in which to present its case, the Supreme Court of Canada like the British appellate courts places no strict time limit on oral argument. However, neither the

¹ Of course, another way of approaching this problem would be to reduce the Court's case load by eliminating those appeals which do not raise important issue. Professor McWhinney has argued that "the amount and complexity of the business before the Canadian Supreme Court is now approaching the stage where the court must either, as the United States Supreme Court did years before, devise some permissible limits to the number of matters that the court must take, or else cease to be able to perform its main functions intelligently and usefully. It is a matter, really, of adequate time and opportunity for judicial research prior to the arriving at decision, and, more important, of adequate time for judicial reflection on great policy issues." Canadian Jurisprudence (Toronto, Carswell, 1958) pp. 17-18.

Supreme Court's bench nor its bar have been willing to spend as much time on oral argument as have their counterparts in England. In the House of Lords, for example, as many as twenty days might be consumed by the hearing for a single case and the average is about three days.¹ In Canada's Supreme Court, while no precise record has been kept, the average, or better, the median, would appear to be closer to half that time.²

But although oral argument in the Supreme Court might not be quite as extensive as it tends to be in the senior British courts, still it remains the most decisive stage in the Court's decision-making process. This means that the judges rely mainly on the counsel in their oral arguments to pinpoint the main issues and develop the central considerations for each side of the case. The Court, then, tends to see its role as essentially that of deciding the relative merit of the points raised in debate by counsel rather than that of independently studying the issues with a view to working out what from a technically legal or policy-oriented point of view appear to be the most appropriate solutions.

¹ Delmar Karlem, above, page 197 , footnote 1, 126.

² This is based on estimates by the Court's officials. Also Justice Cartwright has said, "...some cases take a matter of several days and it is unusual for a case to finish in less than a day." "The Supreme Court of Canada", 45 Law Library Journal (1952) 441.

The hearing in most cases is conducted in a fairly informal atmosphere with a considerable amount of interchange between lawyers and judges. Counsel for the appellant leads off the hearing, presenting his reasons for upsetting the decision of the court below. Members of the bench might intervene to ask him further questions on a particular point or to indicate to him the points upon which they remain unconvinced. The judges in some cases will converse with each other while the argument is in progress in order to agree on the aspects of the case which they feel merit further exploration. In some instances, after hearing some or all of the appellant's argument, the bench may feel that no strong reasons have been advanced for reconsidering the opinion of the courts below, in which case they will dismiss the appeal and terminate the hearing without argument for the respondent. Our study of the Court's minute-book for the 1964-65 sessions of the Court indicated that about one out of every eight appeals coming before the court was treated in this way. This, of course, reflects the fact that a large proportion of the Supreme Court's cases are not screened by the Court but are appeals as of right.¹ But normally the respondent's argument is heard and then each side has an opportunity to reply; again there will be considerable amount of

¹ See above, pages 108-9 & 148, for a discussion of this phase of the Supreme Court's jurisdiction and below, page 287-290 for a quantitative analysis of the role of appeals as of right in the Court's work-load.

cross-examination of counsel by the bench. Two counsel may be heard for each side in the first stage of argument but only one counsel will be heard for each side in reply.¹ After the oral argument is heard the Court usually reserves judgment.

In this kind of appellate procedure oral communication is mainly concerned, not with the examination of witnesses, but with the debate between the opposing counsel and the direction of that debate by the bench. In this context the question of the language--French or English--which counsel and judges use can have a very significant impact on the facility of communication and the degree of comprehension enjoyed by all those participating in the hearing. The most obvious situation in which a difference of languages may adversely affect communication is when English-speaking judges who have a very limited understanding of French sit for cases in which counsel through choice or necessity argue in French. Our examination of the Court's composition in Quebec's appeals, which we reported above, indicated that these situations frequently occur. In these circumstances the English-speaking judge should to some extent be assisted by the factum and the "case" which, even if he has not studied them thoroughly beforehand, he will at least have before him during the hearing. He might be further assisted by his

¹ Rules of the Supreme Court of Canada, 1945. Rule no. 38.

French-speaking colleagues on the bench and could direct questions through them to the French-speaking counsel. Also, if counsel is fairly bilingual, he might switch from French into English in order to communicate more effectively with the English-speaking judge. Still it is likely that in many of these situations one or two of the English-speaking judges will be less than perfectly informed of the progress of the argument as it evolves.

Language difficulties may also make it difficult for litigants to follow the hearing. This is apt to occur when each side pleads in a different language and counsel or the parties on one or both sides are not bilingual. In this situation, even if the case were being conducted before a completely bilingual bench, one or both sides might experience difficulty in adequately comprehending the proceedings. Counsel for each side will have had an opportunity to examine the other side's factum some time before the hearing,¹ but it should be borne in mind, that in contrast to the American practice counsel can only directly reply to his adversaries points during the oral argument.² The permission granted in the Rules to have two counsel represent each party means that theoretically a litigant's

¹ Rule No. 29 of the Supreme Court Rules stipulates that factums must be filed fifteen days before the first day of the session at which the appeal is to be heard.

² See below, page 201 .

lawyer could compensate for his linguistic inadequacies by bringing another lawyer into the case. However, when we asked French-speaking members of the Supreme Court bar whether they ever resorted to this device we received one positive reply.¹ On the other hand there are known instances of English-speaking lawyers or firms associating a French-speaking counsel with a case when it goes before the Supreme Court and the other side is expected to plead in French.

We have touched here only on the ways in which the lack of complete bilingualism on the part of either the Supreme Court's bar or bench might impair communications during the oral argument stage of proceedings. But over and beyond this there is a problem which some might view as more serious: that is the extent to which anticipation of these language problems might either inhibit lawyers from taking cases in the Supreme Court or cause them to plead in the language which is not their native tongue. These possibilities are most likely to arise among French-speaking lawyers who knew very little English; an English-speaking lawyer who knows no French will at least be assured that all the judges will fully understand him when he argues in English. That these possibilities actually occur is indicated by the results of the questionnaire which we sent out to French-speaking lawyers and which we report below. Among

¹ See below, page 258.

other things, these results indicate that French-speaking counsel argue in French about as frequently as they prepare their factums in French.¹ This again indicates that some of them are induced or constrained to use English rather than their first language in oral argument.

There are a number of approaches which might be suggested towards overcoming some or all of the language difficulties which we have described. Certainly the most idealistic would be to insist that the Court's judges be thoroughly fluent in both English and French. Even if it were considered impractical to make bilingualism a qualification for all places on the Court's bench, one might at least insist that the panel of judges which hear cases pleaded by Quebec lawyers, or for that matter lawyers from any other part of Canada, who wish to argue in French, exclude any judges whose understanding of French is inadequate. Even with the Court's current personnel it might be possible to follow this rule at least for five-judge panels, although by doing so it would probably mean that the same five judges would hear all such cases and this would seriously reduce the availability of these judges for the Court's other work. Also merely requiring that there be available a panel or quorum of bilingual judges would not solve the problem for cases in which the whole court sits. Surely it is as important, if not more important, that a French-speaking person be assured

¹Note that there is no Court record of the language in which a hearing is conducted.

of the most effective kind of hearing in a constitutional case where it is desirable that the full court be present, as in a private law case where only five judges normally attend.

The imposition of a fairly stiff linguistic requirement on the selection of judges would certainly raise some recruitment problems. As we pointed out earlier in this chapter the field of eligible and promising candidates for positions on the Supreme Court is already severely limited by certain political and professional factors. One might question whether it is wise to reduce the field still further by adopting a bilingual requirement for Supreme Court membership. A partial answer to this point would be to advocate that some of the political and geographic considerations which now are responsible for drastically narrowing the field be dropped and replaced by more appropriate criteria among which would be an ability to speak the country's and the Court's two official languages. But even if this were to be accepted as a legal or conventional ingredient of appointment policy, we must acknowledge the practical difficulty in the way of applying a meaningful language test. The only kind of test which is likely to be acceptable to the kind of persons who are good candidates for Supreme Court appointments would have to be an informal one based primarily on the man's reputation and reputation is not always a reliable guide to a person's real linguistic versatility. Perhaps the least that could be expected, given the shortage

of French-speaking talent on the Court, is that judges selected to fill Quebec vacancies on the Court be, if not thoroughly bilingual, at least fluent in French. It could scarcely be contested that such a requirement is now less likely to be violated by the Quebec government if it had some share in selecting Quebec jurists for the Court, than by the federal government.

If one gives up, at least as a short-run possibility,
the idealist approach of eliminating the language problem by
establishing a completely bilingual judiciary, another more
drastic way of attacking the problem which must be considered
in setting up some form of translation system for oral pro-
ceedings. Indeed this proposal would merit consideration even
if the Court's bench were fully bilingual, for in that
event there would still be the problem of counsel not under-
standing each other when they spoke different languages and
one or both sides were not bilingual. Objections to the pro-
posal of using a system of simultaneous translation similar
to that which is now available to Members of Parliament are
likely to turn primarily on the difficulty--some might say
the impossibility--of providing a translation of legal argu-
ments which is both instantaneous and accurate. Those who
are fully bilingual and well trained in law know how diffi-
cult it is even with ample time for research and reflection
to render legal terminology from French into English or
English into French. The person or persons providing the
translation would have to be quite well prepared in law as

well as being first-class linguists, and even then such persons, no matter how well-qualified, would often stumble; in some instances they would undoubtedly be unable in their translation to come very close to catching the real tone and direction of the rapid, conversational exchanges, between counsel and the bench. And yet while the weight of these considerations cannot be underestimated, one must still ask whether the inaccuracies and gaps which would inevitably be present in simultaneous translations would result in a lower level of comprehension between monolingual lawyers and jurists of different tongues than that which now exists without translation. We might also note that a translation service would be provided for only that relatively small percentage of cases in which there is a language barrier between the counsel or between counsel and members of the bench. The personnel hired for this purpose would have to be of rather high professional achievement and thus could, when not engaged in providing translations, usefully augment the Court's research staff.

We have not in this study been able to carry out a detailed comparative study of the treatment of language problems in other jurisdictions and the secondary source materials on this subject are extremely limited. Moreover, we have reason to believe that some dimensions of the Supreme Court's language problem are unique: unlike the senior courts of other multilingual countries such as Switzerland and Belgium, Canada's Supreme Court sitting in

banks of five or more judges must adjudicate cases in which oral argument is usually the lengthiest and most decisive stage of proceedings. In Switzerland's Federal Tribunal which, with the Confederation's three official languages¹ represented on its bench,² perhaps comes closest to the Canadian Supreme Court's situation, "oral argument by counsel, when herd (sic) at all, is treated lightly. In the public law section none is allowed. In the civil law section it comes after the case has been digested by the reporter judge and immediately before he presents his already prepared report. In strong contrast to modern U.S. practice, no judge interrupts an attorney's (sic) argument by questions or guides him in any way."³ The principal form of public debate in the Swiss system is that which takes place among the judges when the reporter judge's opinion is reviewed by his colleagues. In these public judicial conferences French and German are intermingled (in practice Italian is not used) and no translation service is provided.

We do find a translation service used, however, in

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Article 116 of the Federal Constitution of Switzerland declares that "German, French, Italian and Romanche are the national languages of Switzerland," whereas German, French and Italian are "The official languages of the Confederation."

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Christopher Hughes, The Federal Constitution of Switzerland (Oxford: Clarendon Press, 1954) p. 120.

³

William G. Rice, Law Among States in Federacy (Appleton, Wisconsin: C.C. Nelson) p. 113.

oral proceedings before the International Court of Justice at Le Hague, where the two official languages are French and English. Article 58(1) of the Court's Rules provides that

In the absence of any decision to the contrary by the Court, or by the President if the Court is not sitting at the time when the decision has to be made, speeches or statements made before the Court in one of the official languages shall be translated into the other official language; the same rule shall apply in regard to questions and answers. The Registrar shall make the necessary arrangements for this purpose.¹

In practice these translations take the form of written translations prepared on the spot and distributed to the participants in the case. Shabtai Rosenne describes the procedure as follows:

The remarks of the President and his colleagues are translated into the other official language immediately; speeches are broken off at ten or fifteen minute intervals for translation. Although printed versions of the speeches are rapidly prepared and circulated it would be a mistake to consider the oral hearing as nothing more than a continuation of the written pleadings.²

We should note that this type of written translation is likely to be less manageable in the Supreme Court of Canada than it is at Le Hague, for in the International Court oral proceedings lay a greater stress on formal, prepared addresses by judges and counsel than on informal discussion between bar and bench.

¹ The Statute and Rules of the International Court of Justice are printed and discussed in Shabtai Rosenne, The International Court of Justice, (Leyden, Sythoff, 1957).

² Same, p. 395. Note that Article 39(3) of the Statute also calls for translations into one of the official languages when a party is granted permission to use some language other than French or English. In this situation Article 58(2) of the Rules stipulates that the party must provide the translation.

Still there is a considerable scope for judicial interrogation of counsel and we should not lose sight of the fact that this stage of oral argument is often there, as in Canada, a critical stage in the adjudication of a case. There may well be merit in carrying out a closer study of the International Court's treatment of translations with a view to adapting some phase of it to the Supreme Court's purposes.

Short of translations there are two more modest ways of compensating for the lack of complete bilingualism among the Court's bar and bench. One very simple and inexpensive device would be to record the oral proceedings. Without making any transcript, let alone translation, of the recording, judges could at the very least play back the tape after the hearing (or even during an adjournment) to go over some portion of the argument which they might have missed (or forgotten) when it was delivered in Court. This could surely assist the English-speaking judge who has difficulty in following the rapid delivery of French-speaking lawyers. It would be of even more help if such a judge were assisted in preparing his opinion by a French-speaking law clerk.

In the United States Supreme Court each argument is recorded and although no transcription is made, "The tape is available to be replayed in chambers by any Justice who wishes to hear the argument again. This often proves helpful in the drafting of opinions."¹ Thus aside all together from their

¹ Delmar Karlen, above page 197 , footnote, 1, pp.
71-2.

usefulness in overcoming some of the judges' language problems, recordings of oral arguments might well be of general value to the whole Court in the preparation of opinions. No record of any kind is now kept of the substance of oral arguments in the Court; tape-recordings of hearings would be a relatively painless way of making an invaluable addition to the Court's permanent record of its own proceedings.

A final suggestion for reducing the severity of the language problems which may exist during some hearings would be to develop the Court's procedures so that the oral stage comes to play a less significant role than the written submissions in the Court's proceedings. Language disabilities are apt to be less severe in reading written material than they are in following oral arguments. As we pointed out above, while there may be several English-speaking members of the Court who have considerable difficulty following spoken French, there are few, if any, who could not read French language materials and, further, when they encounter difficulties in a written text it is quite easy to consult a dictionary, or a French-speaking colleague (or even a bilingual law-clerk!). The same general point would also hold true of lawyers who have difficulty following oral agreements in French or English. Certainly a minimal move in the direction of reducing oral arguments and one which would have attractions beyond anything that it might contribute towards easing the language problem--would be to cut down the amount of time spent in reading authorities.

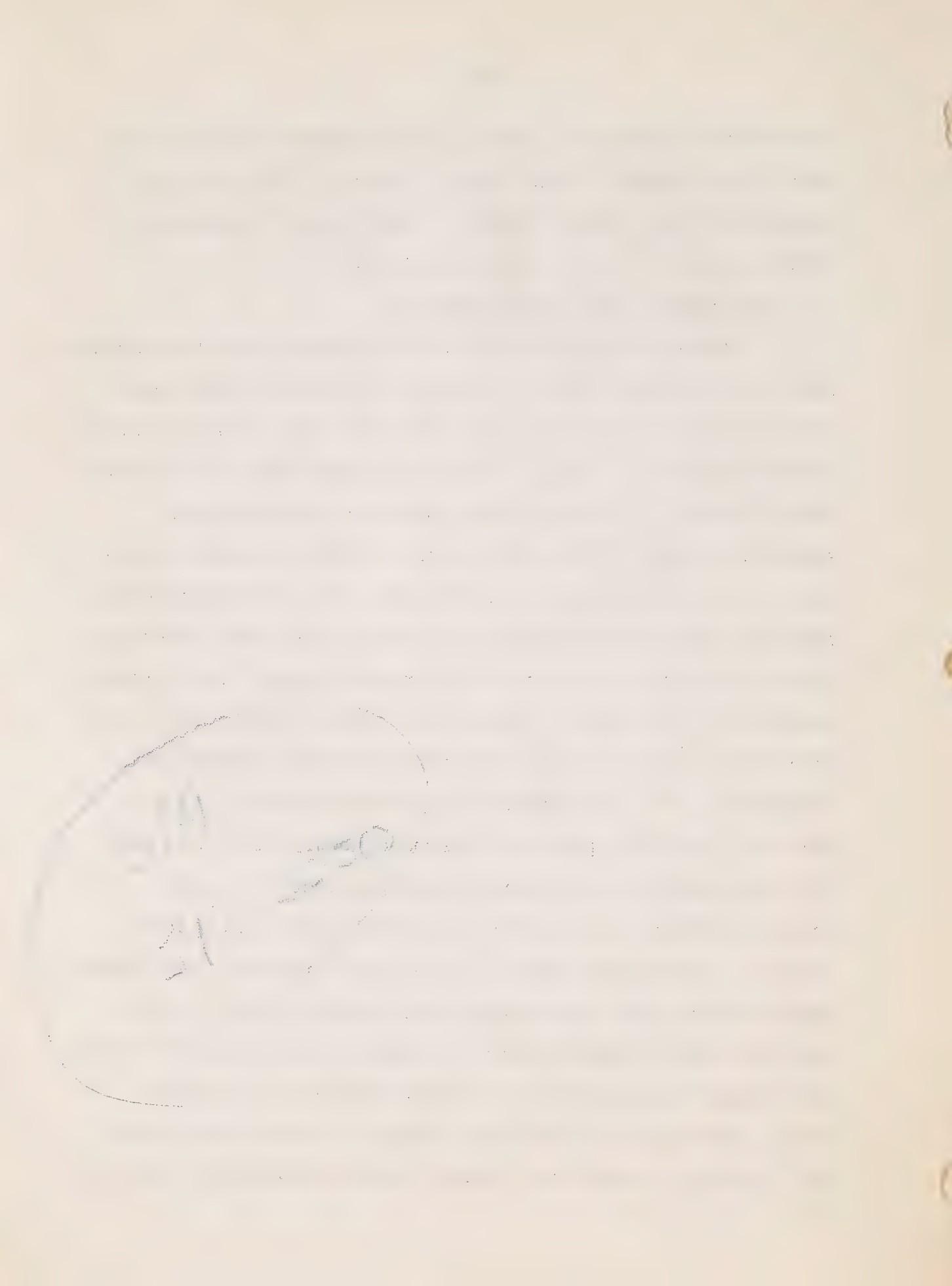
As with the suggestion of recording hearings, a shift in emphasis from oral argument to the preparation and study of written presentations might bestow broader benefits upon the Court. Of course, one's assessment of the consequences of such a shift will necessarily depend upon one's ideal of the appropriate adjudicative style for the Court. Those reared in the Anglo-Canadian tradition of legal practice are apt to look upon any diminution in the significance of oral agreement as cutting at the very heart of the process of litigation. However, against the traditional image of the barrister as the skilful court room debater might be placed some consideration of the special functions and problems of a highest appellate court responsible for settling the most contentious legal problems produced by a bicultural and federal country. In this context, as we have suggested earlier, it might be appropriate for the Court to develop procedures which concentrate more of its energies on carefully researching the problems which come before it and less on umpiring the points raised by lawyers (who may not be able to understand each other) in oral debate.

Perhaps one of the easiest and least controversial steps that might be taken in the general direction of reducing the relative importance of the oral stage of proceedings would be to permit the respondent to see the appellant's factum before submitting his own so that he would have an opportunity before entering the court room of replying to any new points raised by the appellant. This change in the Court's rules has been

recommended before and, indeed, is consistent with practice both in the United States Supreme Court and the Judicial Committee of the Privy Council. What better credentials could a proposal for reform possibly have?

(c) Conferences and Opinion-Writing

Between the completion of the hearing and the announcement of the Court's final judgment, a period of some weeks or months may lapse--a period which will often span two of the Court's sessions. During this period there will be a considerable amount of collaboration and mutual consultation among the judges in the process of reaching a decision on a case. The conferences which take place in the Supreme Court are not nearly as extensive or systematic as those which are held in the Supreme Court of the United States. But a rough pattern can be traced. Usually the judges who sat for a case will hold a brief informal meeting after oral agreement is completed. The main purpose of this conference is to see how the judges are generally disposed towards the case and, if there seems to be a fairly clear consensus, to agree among themselves as to which judge will write the Court's opinion. If the case proves to be more difficult, the judges might discuss the issues again at a later conference after they have had an opportunity to clarify their respective views and perhaps to draught and circulate tentative opinions. Often, although not regularly, during a session conferences will be held at which the judges review the progress they have



made on some of the most difficult problems currently before the Court. Throughout this process a considerable effort is made to achieve unanimity among the judges who are participating in a decision, or, where this is not possible, to at least reduce the number of divisions among the judges on a particular case. Part of this effort is the circulation of draught opinions among the judges before judgments are finally written.

This degree of collegiality in the Supreme Court's decision-making certainly exceeds that which takes place in England's highest appellate courts. In the House of Lords, for example, judges circulate their opinions, but after they are finally written; formal conferences are rare and it is unusual to attempt to reach agreement on an "opinion of the court"—in most cases "each judge is merely preparing to express his individual views."¹ On the other hand, conferences in the United States Supreme Court play a far more central role in decision-making than they do in the Canadian Court. There the full Court attends regular weekly conferences at which petitions for certiorari are discussed and voted upon, all of the judges express their views on the cases recently argued in the Court and on opinions which are being formulated, and when the Court's consensus or divisions become clear, opinion-writing assignments are made so that one judge is charged with writing "an opinion of the Court" or at least a majority opinion. It would be out of place

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Delmar Karlen, above, page 197, footnote 1, p. 127.

here to go very deeply into the pro's and con's of these two contrasting approaches to judicial-decision-making and to try and build a case for the Canadian Supreme Court's moving more deliberately in the direction of either the British or American model. However we would like to indicate the way in which the Supreme Court's system, or lack of system, in this phase of its operations may affect its capacity for contributing to biculturalism.

The point to be brought out here is that if one takes seriously the possible contribution which a general court of appeals for all of Canada might make to the fruitful interaction of the country's two main legal traditions--the English common law and the French civil law--then it could be argued that the Court's mode of operation should be adjusted to create greater scope and opportunity for inter-action among the judges in the process of working out decisions. It is appropriate to recall here the words of Chief Justice Rinfret which we quoted above describing the advantages which members of the Court derived from the opportunity presented in the Court's conferences for comparing the common law and civilian approaches to particular legal problems.¹ These comparative law benefits might well be extended if the Court's conferences were held more frequently, involved more intensive discussion of individual cases and opinions, and, in general became a more regular feature of the Court's decision-

¹ See above page 78.

making procedure.¹

But as we have seen in tracing the history of Quebec attitudes to the Supreme Court, Chief Justice Rinfret's enthusiasm for the comparative law advantages of the Supreme Court's practice represents only one school of thought; there are certainly other Quebec jurists whose first priority is not the mutual impregnation of common law and civil law concepts, but, the preservation of the purity of Quebec's civil law system. Those who share this attitude are inclined to advocate Supreme Court reforms which would increase and perhaps even formalize the division of the Court into specialized bancs or chambers at least for the purpose of adjudicating private law issues in the two major traditions of legal culture.² Professor Albert Mayrand, for example, has proposed establishing within the Court two chambers, "l'une de common law et l'autre de droit civil, ou, encore exiger que les affaires de droit civil soient entendues

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Professor McWhinney has been foremost among English-speaking jurists in emphasizing the comparative law advantages to be reaped from the Supreme Court's situation--advantages which he has described as "The inestimable benefits, in a plural society of full and constant exposure to the problems from both main streams of law." Above, page 210, footnote 1, pp. 18-19.

²

See above discussion of Tables 1b and 1c. pp. 165-175 for amount of specialization already present in the Supreme Court's division of labour.

devant une majorité de juges civilistes".¹ But even if this approach were adopted there would still be a need for the full court--including both its English common law and French Civil Code divisions--to come together for the purpose of adjudicating issues which are of general federal purport and especially those which raise important questions of constitutional law and civil liberties.

In these areas where there is likely to be a continuing interest in having a full national court make decisions, there is much to be said for procedures which increase the collective nature of the Court's approach to decision-making. By talking out these issues more thoroughly in conference and working even more deliberately and strenuously at defining a consensus (if not for the whole Court, at least for a majority) both as to a decision's reasons and its conclusions, the outcome of the Court's decision-making in these areas may be more than simply the mechanical aggregation of nine separate opinions. If the country's jurisprudence relating to what are indisputably the common concerns of all its citizens is to reflect some interaction of English and French, common law and civil law norms and precepts, the governing opinions of its highest court must to some extent be the outcome of a process of collaboration and accommodation among representatives of the two cultures. Such a process is surely

¹ Above, page 80, footnote 2, p. 2. Note that Professor Mayrand certainly favours the development of comparative law techniques in Canadian jurisprudence but argues that comparative law, rather than resulting in thoughtless imitation should "reinforce le particularisme de chaque système juridique en mettant en relief ses caractères fondamentaux." Same, p. 3.

more likely to occur if all the judges met regularly during each session and devoted much more of their energy to finding mutually acceptable solutions to the major issues--particularly in the public law field--recently argued in the Court.

The adoption of a policy of extending and regularizing the Supreme Court's conference system would, like a number of the other proposals considered in this report, have more general benefits than those affecting the Court's bicultural capacities. Bora Laskin perhaps the leading Canadian student of the Court, and now himself a member of Ontario's Court of Appeals has used these words to stress the general rewards to be gained by increasing the Court's procedures for consultation and discussion:

The advantages of a system of consultation in terms of time for reflection, of preliminary reconciliation of positions, and of clarification of principles, of providing a group opportunity for assessing immediate and long-range consequences--in other words, of enabling the Court to act as an entity--are beyond dispute.¹

Laskin and others have drawn attention to the tendency for the lack of consultation and conferences in the Court to produce a number of repetitive and overlapping opinions for a given case. Since the Court's earliest days its practice of seriatim opinion-writing has caused considerable disgruntlement among members of the country's legal profession.² While nowadays few Canadian jurists would be attracted to the Privy Council's practice of presenting every decision as

¹ Above, page 68, footnote 1, p. 1048.

² See above page , The Canadian Law Journal's complaint of this practice.

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the opinion of a unanimous court, many would like to see the Supreme Court develop an opinion-writing method which might make it easier for both practising lawyers and the interested public to clearly identify the Court's largest common denominator of opinion on a given issue. The Court's failure to produce "an opinion of the court" for every case can be overdrawn;¹ what is more generally advocated is a more economical use of judicial energy in opinion-writing and a more self-conscious effort to produce only those opinions which will indicate the really significant differences among the Court's members.² No doubt before the Court can act, "more as an entity" (to use Justice Laskin's words) there must be an increase in the amount of leadership exercised by the Chief Justice in effectively co-ordinating the work of his colleagues.

¹ Professor Abel in the manuscript referred to above at page 200, points out that his own study shows the Supreme Court of Canada producing an "opinion of the court" more often than the United States Supreme Court.

² For an interesting comparison of opinion writing techniques in different English speaking jurisdictions see Edward McWhinney, "Judicial Concurrences and Dissents: A Comparative View of Opinion-writing in Final Appellate Tribunals." 31 Canadian Bar Review (1953) 595. Professor McWhinney contends that the bicultural nature of the Supreme Court of Canada provides a strong reason for that Court's endeavouring to produce single opinions.

(d) Judgments and Reports

The final stage in the Court's adjudication of a case is reached when the Court¹ delivers its judgment. Compared with the dramatic and rather elaborate "opinion days" which the American Supreme Court stages almost every Monday when it is in session, the Canadian Supreme Court's method of announcing its judgments is very informal - one might almost say casual. There is no regular day upon which judgments are delivered, opinions are often filed without being read, counsel do not always attend² and the whole event, even when the Court is bringing down its decision in an important constitutional case, receives very little public notice.

The language used when the Court delivers its judgment will depend on the presiding judge and the language used in the litigation. If the presiding judge is French-speaking and French was the principal language used in the pleadings, then the judgment will probably be delivered in French. Otherwise it will be in English. No translations are provided.

¹ Note that section 26 of the Supreme Court Act states that, "it is not necessary for all the judges who have heard the argument in any case to be present in order to constitute the Court for delivery of judgment in that case, but in the absence of any judge from illness or any other cause, judgment may be delivered by a majority of the judges who were present at the hearing." R.S., c.35, s.26.

² Although according to Rule 40(b), "counsel representing the parties will be expected to attend upon the pronouncement of judgment, and in default of such attendance the pronouncement of judgment may be deferred."

Given the inconsequential nature of this stage of proceedings there is little point in concerning ourselves with the possible lack of bilingualism that may exist here. There is, however, some merit in considering some alterations in the method of delivering judgments which might make this stage of the proceedings a more integral and impressive part of the Court's routine. Surely the judgments of a Court which can have such significant consequences for the whole nation, particularly for its constitutional structure should attract the interest of more than the immediate parties to a case. One way of engaging the attention of a broader public might be to make the oral delivery of judgments a more auspicious occasion. If this were done so that in a more public sitting, at regular intervals, judges read their opinions in full, it might be well worthwhile providing some form of translation. Probably the most practical form of translation would be a written translation of each judge's opinion distributed beforehand to those attending. But this leads to a much more pressing question relating to bilingualism: the absence of any translations of the judges' opinions in the official reports of the Court.

The Registrar and Deputy Registrar are charged with the responsibility of producing the official reports of the Court's judgments.¹

The Supreme Court Reports are published as a separate

¹ Supreme Court Act, s. 17.

series of the Canada Law Reports.¹ At present this series is jointly edited by a French-Canadian and an English-Canadian lawyer, M. Francois des Rivieres, The Deputy Registrar of the Court and Mr. Mills Shipley respectively. A high proportion but by no means all of the Supreme Court's decisions on the merits are published in the Reports. The Supreme Court Reports for the years 1950 to 1964 (inclusive) reported 1001 judgments and listed 415 unreported judgments.² The reported judgments include all the important cases which the Court has settled, especially constitutional cases, important issues of federal law and cases in which the Court was divided.³ While the editors take the initiative in the selection of cases members of the Court's bench could certainly intervene if they thought an important case was being overlooked. Records of unreported judgments can be found in the Supreme Court's library.

¹ Supreme Court judgments are, of course, reported in a number of other general series such as the Dominion Law Reports and the Annuaire de Jurisprudence du Quebec and such specialized series as Canadian Labour Law Cases, Dominion Tax Cases, Canadian Criminal Cases, Criminal Reports, Canadian Insurance Reporter and the Canadian Bankruptcy Reports.

² This corresponds with the practice of The House of Lords and Privy Council which publish about 75% of their decisions, whereas the United States Supreme Court would publish nearly all its decisions. See Karlen, above page 197, footnote 1.

Note that when, in addition to the Supreme Court's decisions on the merits, its decisions on granting leave to appeal (on "motions") are taken into account only about 1/2 of its decisions are reported.

³ See below pp 281-3, for further discussion of the Supreme Court's policy in reporting decisions.

One can hardly overestimate the importance of the Reports as the indispensable medium through which the Court's decision in a particular case becomes part of the country's basic jurisprudence. When we take into account the respect which Canadian jurists, both in French¹ and English Canada have shown for the principle of stare decisis both in the sense that lower courts are bound by the decisions of higher courts and that the highest court, the Supreme Court of Canada, is bound by its own previous decisions, it is clear that the Supreme Court's reported decisions will contain many of the governing precepts of Canadian law. Not only do the Supreme Court's reported judgments have a legislative function within Canadian jurisprudence but they affect potentially every area of law, federal and provincial; and, in the area of constitutional law the Court's judgments on the division of powers are rendered doubly important by virtue of the fact that they are not easily amended by the elected legislatures.

Given then the unquestionable importance of the Supreme Court's decisions for the country's basic legal structure, we do not hesitate to record here as one of the Supreme Court's most serious inadequacies from the point of view of bilingualism the lack of any sustained or balanced attempt to report the Court's decisions in Canada's two "official" languages. Since most of the Court's members are

¹ See above, page 67 footnote 2 reference to articles by Mignault and Friedmann describing the Quebec Courts' acceptance of stare decisis with respect to Supreme Court decisions.

English-speaking and these English-speaking judges never write their judgments in French,¹ this means that the bulk of the Court's judgments are reported in English. The French-speaking judges write opinions in both languages; if the case they are deciding is from Quebec, in all likelihood their opinion will be written in French², whereas if it deals with a matter of national interest, they might express themselves in English. No translations are provided.

The only deviation from this pattern occurred in the Court's early years when some of the Quebec judges' French opinions were translated into English and both versions were published in the Supreme Court Reports. This development would appear to have been prompted by complaints directed by English-speaking lawyers against the Court's first few publications of opinions written only in French. The editor of the Canadian Law Journal reviewing the first volume of the Supreme Court Reports chastised the editor for reporting one of Mr. Justice Fournier's judgments in French. "If some of the judgments of the Supreme Court are to be published in a foreign tongue," he exclaimed, "it will be necessary for those who are in charge of the education of law students in the English speaking Provinces to insist upon the French

¹See above, pages 156-60, for a more detailed account of the linguistic capacities of the Court's members and the languages used in writing opinions during the post-1949 period.

²See below, Chapter IV, Tables 13 and 14, for a quantitative analysis of opinion-writing in Quebec appeal cases.

language being added to the curriculum." But seeing no point in encouraging the English-speaking lawyers to become bilingual the editor concluded by warning the Court's reporter, "...that the major part of his readers do not know French, and are not likely to learn it simply for the pleasure of reading an occasional judgment in that language."¹ For the next decade the Court made only a very modest accession to this protest. In each volume of the official Reports one or two of the opinions written by French-speaking judges--usually on a constitutional matter, a controverted election or an Exchequer case--would be translated into English.² However, English-speaking opinion must have been considerably mollified by the fact that Justice Henri Elzear Taschereau who took his cousin Jean Thomas' place on the Supreme Court bench in 1878 wrote nearly all of his judgments in English. But Justice Fournier who was either less accommodating or less bilingual persisted in writing most of his judgments in French, and with few exceptions these were published in the Court's

¹ Canadian Law Journal (1877) 341-2.

² We found 9 cases in which a judgment written in French is accompanied by an English translation: Brassard et al v. Longevin (1877), I.S.C.R. 145, at p. 188, Caverhill v. Robillard (1879), 2 S.C.R. 575, at p. 584 (J.T. Taschereau); Severn v. The Queen (1879), 2 S.C.R. 70, at p. 115, Valin v. Langlois (1886), 3 S.C.R. 1, at p. 36, Citizens' and The Queens Ins. Co. v. Parsons (1880) 4 S.C.R. 215, at p. 253, The Queen v. Belleau (1883) 7 S.C.R. 53, at p. 56, The Queen v. McLeod (1884) 8 S.C.R. 1, at p. 29, The Queen v. Dunn (1866), 11 S.C.R. 385, at p. 387 (Fournier); The Queen v. Dcutre (1882), 6 S.C.R. 342, at p. 400 (H.E. Taschereau).



Reports without any accompanying translations.

The only attempt the Court has made to introduce some measure of bilingualism into its official reports has been in relation to the head-notes for cases. Each reported judgment is introduced by a head-note written by the editors of the Reports. The head-note provides a succinct summary of the controversy involved in the case together with brief paraphrases of the judges' opinions designed to illuminate the main points of law determined by the majority and the main points of dissent. For most lawyers who require a convenient guide to the Court's decisions it is an indispensable guide. Until 1963 no head-notes were written in French, even in cases in which the main judgment was rendered in French. In the 1963 Supreme Court Reports, seven Quebec appeal cases with judgments written exclusively in French were introduced by French head-notes.

In 1964 the editors of the Reports were experimenting with a number of approaches to the treatment of language in the head-notes. The 1963 practice of providing French head-notes for French judgments was continued at least for three Quebec appeal cases which concerned some aspect of Quebec's civil law which would be of little interest to lawyers outside of Quebec.¹ But, in addition to this, bilingual head-notes

¹The cases selected for French head-notes the year before were not confined to Quebec legal issues. Two were criminal law and one raised a conflict of laws question.

were introduced for the first time: in eight cases from Quebec¹ for which both French and English judgments had been written, the head-note was in the two languages. In six of these, the same head-note was written twice, once in each language²; in the other two the same note contained both French and English passages. Unlike the cases for which only French head-notes were provided, these cases all raised questions of some considerable interest to non-Quebec as well as Quebec lawyers.³

The editors of the Supreme Court Reports have continued to experiment with bilingual head-notes in the 1965 volume. Again for three cases involving Quebec's Civil Code only French head-notes have been written;⁴ for a larger number of appeals French and English head-notes were prepared. But in contrast to 1964, the cases chosen for bilingual head-notes were not confined to decisions in Quebec law-suits for which French and English opinions had been

¹One of these was an appeal from the Exchequer Court, but concerned a Quebec law-suit.

²One is not a translation of the other. The Deputy Registrar prepared both versions, writing each one separately.

³One of these was Saumur et.al. v. Procureur General de Quebec et al. (1964) S.C.R. 252, which involves the most recent (and abortive) attempt of the Jehovah's Witnesses to challenge the constitutional validity of Quebec's Freedom of Worship Act.

⁴Our examination stopped at the end of Part VI of the 1965 volume, page 440.

submitted. Included in this group of eleven cases were four appeals from the Exchequer Court and one from the Court of Appeal for Ontario.¹ In all but one² of these cases the central issue concerned some aspect of federal law, ranging from taxation through patents and immigration, to criminal law, and in eight of them the judgments had been written solely in English.

Thus the Court seems to be groping its way towards a more adequate approach to head-notes: instead of using bilingual notes simply as a way of making the introduction of French head-notes in Quebec appeals more palatable to English-speaking lawyers by providing the latter with English equivalents for the French notes, now the Court appears to be moving in the direction of publishing both French and English notes for those cases which raise a question of general importance to all sections of the federation. But this policy hardly goes far enough to satisfy even the most minimal standards of bilingualism. There are still many appeals both from Quebec and the other provinces which settle legal issues of great interests to French-speaking people in Quebec but for which not even French head-notes are provided.

¹The Ontario case was Gordon v. The Queen [1965] S.C.R. 312, and involved a question of procedure under the Criminal Code.

²The exception was Gagnon v. La Commission des Valeurs Mobilières du Québec et al, [1965] S.C.R. 73 and it was essentially concerned with Quebec's Code of Civil procedure.



Take, for example, the case of Guay v. Lafleur,¹ reported in the 1965 volume: in this case the Supreme Court reversed a Quebec decision which represented the first really affirmative application of the Canadian Bill of Rights by a Canadian tribunal. Surely here was an issue about which French-speaking Canadians must have as much interest as English-speaking Canadians, and yet there was not even a French equivalent for the English head-note.

Admittedly the rather hesitant and haphazard manner in which bilingualism has been introduced into the Supreme Court Reports stems from the fact that the Court is still experimenting with various possible treatments of the problem. But it seems highly unlikely that these rather piecemeal approaches to bilingualism in the head-notes, depending entirely on the labours of one bilingual editor, M. des Rivieres, can lead to an adequately bilingual method of reporting the Supreme Court's decisions. At the very least there is an undeniable case for providing French head-notes, for all judgments in Quebec appeals, regardless of the language in which the judgments were written. But beyond this a strong case can be made for publishing both the judgments and explanatory notes, at least for all of those cases which concern matters of national importance, in French and English.

If the Supreme Court is to produce a jurisprudence

¹(1964) S.C.R. 12.



which can be shared by all Canadians, its decisions must be equally accessible to the country's two major linguistic groups. Up until now this condition has certainly not been fulfilled. An English-speaking lawyer could read nearly all of the Court's decisions in his first language and where the odd judgment which might interest him was written in French he was always assisted by a head-note written in English. Furthermore, outside of the official Reports, other series such as the Dominion Law Reports have provided (unofficial) translations of French judgments.¹ But in marked contrast to this the French-speaking lawyer, especially in matters of federal concern, has had to read nearly all of the Supreme Court's decisions in English and until recently even in judgments dealing with the most immediate concerns of Quebec civil law he has not had the benefit of explanatory notes in his own first language. Nor has he found any consistent support by way of translations in any of the other series of Canadian or Quebec law reports.² This large imbalance in the use of French and English for reporting the Supreme Court's decisions has

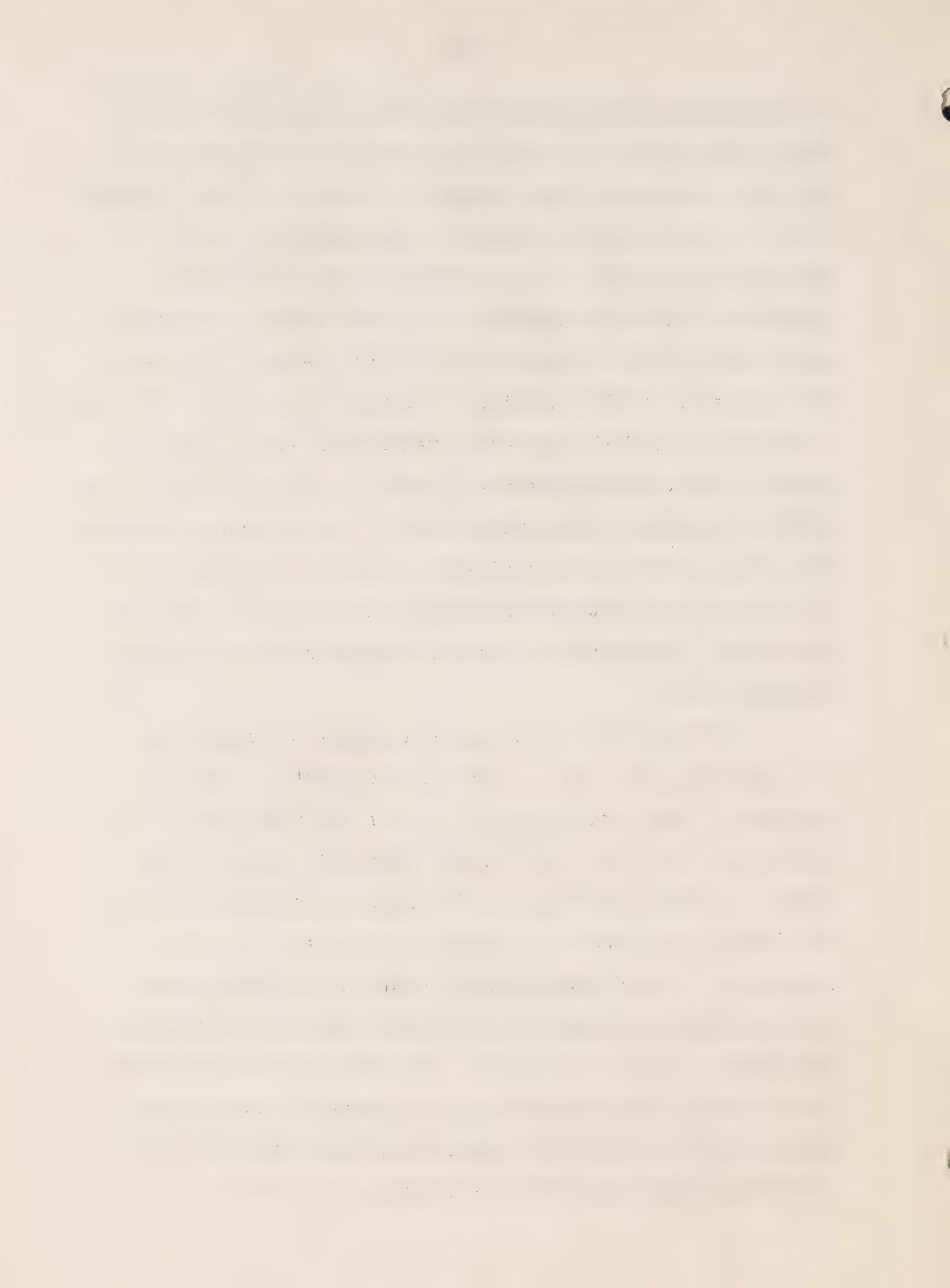
¹ Besides the Dominion Law Reports (Published by Canada Law Book Co., Toronto), the Criminal Reports (published by Carswell Co., Toronto) and Canadian Labour Law Cases and Dominion Tax Cases (published by CCH, Toronto) have provided English translations of Supreme Court judgments written in French.

² The Annuaire de Jurisprudence du Quebec (published by Wilson and Lafleur, Quebec) contains summaries of important Supreme Court decisions. But the digest notes most English judgments in English.



ramifications which extend beyond the convenience of the legal professional. It is in the area of constitutional law that the almost total monopoly of English in the Supreme Court's (and the Privy Council's) jurisprudence has the gravest consequences. In our federal system the highest appellate Court's interpretation of the written constitution very often has had a decisive effect on the most controversial elements in the division of legislative powers. So long as this is so and the operative meaning of some of the Constitution's most important clauses can only be gleaned from judicial decisions concerning them, it is surely as important that these decisions be available in French and English as it is that the Constitution itself, the B.N.A. Act and its Amendments, be printed in the two languages of the Canadian Confederation.

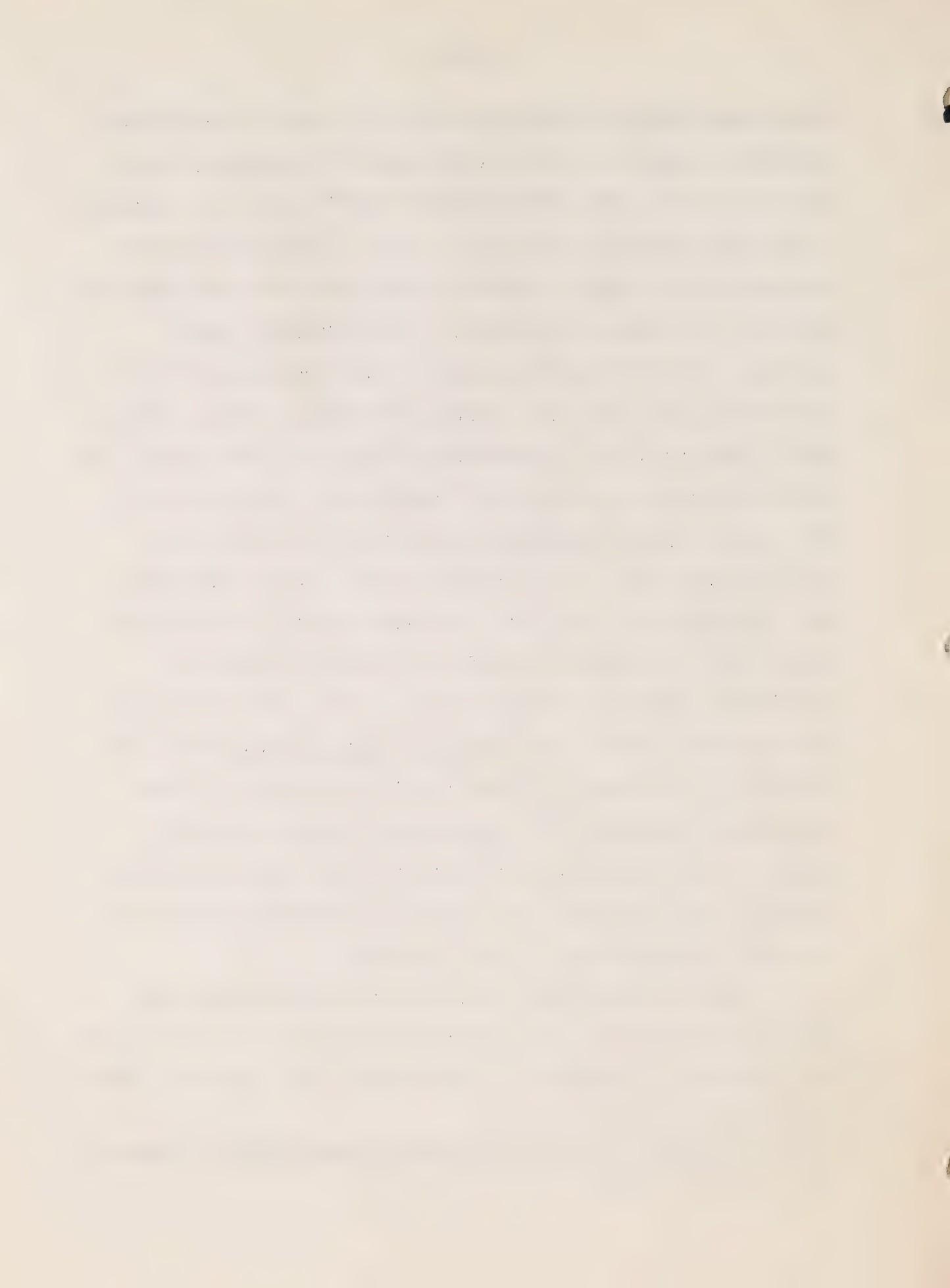
If the Court was to adopt a policy of translating its judgments into one or other of the Court's official languages, these translations to be of any real use to the profession would have to be given official status by the Court. If this were done, it is unlikely that both French and English versions of a judgment could have the same authority. In the International Court at Le Hague where the judgments are always given in the Court's two official languages, French and English, the Court always determines which text is authoritative and, "...possibly due to the speed with which they are prepared and the difficulty of rendering legal texts from one language into the



other--experience has shown the need for care in using that text of a judgment or of an individual or dissenting opinion which is not the authoritative text."¹ There is certainly no denying the difficulties involved in producing adequate translations of legal documents, especially when the languages involved are based on essentially two different legal cultures. Ideally the best method would undoubtedly be to have each judge write his judgment simultaneously in French and in English without translating from one to the other. But as we have seen the linguistic capabilities especially of the Court's English-speaking majority are far below the standard which that method would require. Given the present composition of the Court, the adoption of a translation policy for its judgments could only be facilitated by a significant expansion of the Court's staff. Not only would the editorial staff of the Supreme Court Reports have to be augmented by bilingual lawyers but in addition the judges themselves, especially the monilingual English-speaking judges, would have to receive considerable assistance--again, possibly from bilingual law-clerks--in checking the accuracy of French translations of their opinions.

The problems and burden of providing translations would be greatly reduced if they were required only for decisions which deal essentially with federal legal matters. This

¹ Shabtai Rosenne, The International Court of Justice, p. 417, footnote 1.



would at least meet most of the serious deficiencies in the existing situation, although there would also be a need for French translations of English judgments in Quebec appeal cases. Alternatively the need for translations of judgments would be seriously diminished if the Court carried on the bulk of its private law and provincial law business in two specialized, English common law and French civil law chambers. In such a system the judgments of each chamber could be reported in the language appropriate to their respective legal traditions. The same result might also be achieved by realizing a considerable reduction in the Supreme Court's jurisdiction over areas of law subject to provincial legislative jurisdiction. But in either case, whether a bicameral division of the Court were established or the Court's jurisdiction in provincial law matters seriously reduced, an important core of federal legal issues, especially constitutional questions would remain for adjudication by a supra-provincial tribunal made up of representatives of Canada's two major ethnic groups. Unless Canada is committed to the English assimilation of all its French-speaking citizens who wish to be knowledgeable participants in its federal legal system, then there would appear to be an iron-clad case for publishing in both French and English the decisions of its highest tribunal which bear on the common interests of all Canadians.



ii) Opinion of French-speaking Lawyers

It was felt that in order to gain a better understanding of the nature of any language difficulties which the situation in the Supreme Court might impose on French-speaking counsel it would be helpful to canvas the opinion of those who are most directly concerned - the French-speaking lawyers who in recent years have taken cases in the Supreme Court of Canada. A questionnaire was drawn up for this purpose; it is published as Appendix II to this report. The purpose of this questionnaire was to elicit the opinion of French-speaking members of the Supreme Court bar on at least three dimensions of the language question: 1) the general seriousness of the language problems in the Court and the way in which it is felt they affect the professional work and opportunities of French-speaking advocates; 2) the actual choice of language by French-speaking counsel in oral and written proceedings in the Court and the factors which influence the choice of language; 3) possible reforms for overcoming language difficulties.

This questionnaire was sent to all the French-speaking lawyers who had acted in Quebec cases heard by the Supreme Court between the commencement of the January term 1964 and mid-way through the January term of 1965 when we completed our research. By French-speaking lawyers we mean those whose first language is French. The identification of these lawyers was based on a list of counsel for each case heard during the stated period,



prepared by the staff of the Supreme Court Registrar's office. The Registrar's office assisted in selecting those counsel whose first language was French. Where there was any doubt on this point, we assumed the individual was French-speaking and sent him the questionnaire. A covering letter¹ sent out with the questionnaire asked the addressee to return the questionnaire if his first language was not French.

66 questionnaires were sent out. Three weeks later a follow-up letter was sent urging those who had not returned the questionnaire to do so as quickly as possible. In the end 40 questionnaires were filled out and returned; five were sent back uncompleted by lawyers who had been mistakenly identified as French-speaking. Thus the results reported below are based on the opinions elicited from about two-thirds (40/61) of our population of French-speaking counsel recently active in the Court. While we think it reasonable to assume that with a sample this large the danger of serious sampling variability is low, still we should point out the bias which might be present in this sample. The factor which is most likely to give our sample a peculiar shape is that the lawyers who completed the questionnaire may represent a disproportionately large number of those who are convinced that a language problem exists in the Court, whereas the third who did not return the questionnaire may

¹A copy of this letter appears in Appendix II.

be largely constituted by those who do not regard bilingualism in the Supreme Court as a serious question. If this were in fact the case, then, of course, the results of our survey would unduly magnify the concern felt by French-speaking lawyers about language difficulties in the Supreme Court.

But there is another factor which tends to work in the opposite direction. If we think of the Supreme Court counsel whom we polled as constituting a sample of the whole population of French-Canadian, Quebec lawyers, then it is likely that this sample over-represents those French-speaking counsel who are reasonably well assimilated to the English culture (at least insofar as language is concerned). While there are no special legal requirements for those barristers who wish to practise in the Supreme Court of Canada,¹ the preponderance of English-speaking judges on the Court's bench, in fact, is likely to impose a bilingual requirement on French-speaking lawyers. Evidence of this is provided by the fact that only one of the forty lawyers who answered the questionnaire described himself as less than fairly

¹Section 22 of the Supreme Court Act states that, "All persons who are barristers or advocates in any of the provinces of Canada may practise as barristers, advocates and counsel in the Supreme Court." R.S., c.35, s.22.

bilingual.¹ Some further light is cast on this phenomenon by the answers we received to question 19 of the questionnaire. In question 19 we asked our French-speaking Quebec counsel whether they felt that "language restricts the number of Quebec lawyers who are eligible for Supreme Court practice?"² Three-quarters of those who replied indicated that they thought the language factor either slightly or severely limited the number of Quebec advocates eligible for Supreme Court practice.

a) Gravity of the Language Problems

We first want to see how seriously French-speaking Supreme Court counsel view the language problem. Four of the questions we posed in the questionnaire were designed to elicit assessments of the general gravity of language difficulties in the Court. The first two of these, questions 18 and 19, called for an assessment of the impact of the Court's lack of bilingualism on French-speaking counsel generally: question 18 asked whether lawyers whose first language is French are necessarily handicapped in Supreme

¹This is based on the answers received to question 5(a) of the questionnaire. 24 described themselves as fully bilingual and 15 described themselves as fairly bilingual. Only one lawyer admitted to being slightly bilingual.

²We have stated the question in English here, although the questionnaires were all prepared in French.

Court practice, while question 19 asked whether the Court's linguistic limitations tended to restrict the number of Quebec lawyers who in fact would be able to practise in the Supreme Court. Question 20 raised the language question at the personal level asking whether the respondent himself felt handicapped when practising in the Supreme Court because his first language was French. Finally in question 30(a) we asked whether the language problem in the Supreme Court was so serious as to require reforms of the Court or some change in its jurisdiction.

The answers which we received to these questions are set out in Table 2a. We have separated the responses of the 24 lawyers who declared themselves to be fully bilingual from those of the other 16 lawyers who described themselves as less than fully bilingual.

The answers which we received to these four questions do not indicate that there is an overwhelming body of opinion among French-speaking lawyers which looks upon the lack of complete bilingualism in the Court as a very serious problem. Looking at the first "yes" columns for each of questions 18, 19 and 20 in Table 2a, we can see that a minority of the lawyers polled believe that French-speaking lawyers are severely handicapped because of language insofar as Supreme Court practice is concerned. But against this we must balance the fact that well over a majority of the 40 lawyers gave affirmative answers to all four questions.

Question 18		Question 19		Question 20		Question 31(a)	
Are French-speaking counsel handicapped, because of language in Supreme Court practice?		Does language restrict number of Quebec lawyers eligible for Supreme Court practice?		Are you at a disadvantage in Supreme Court practice because your first lang- uage is French?		Is language problem in Supreme Court serious enough to call for reforms?	
Yes, all most	Yes, a few	No, none	Yes, sev- erely	Yes, slight- ly	No, not at all	Yes, ser- ious	Yes, slight
Fully Bilingual Lawyers	3	6	10	5	8	8	2
Fairly or Slightly* Bilingual Lawyers	3	7	1	5	4	10	2
Totals	6	13	11	10	12	18	10

Opinion of French-speaking Quebec Counsel on Seriousness of the Language Problem in the Supreme Court of Canada

Table 2a

* Of the 16 lawyers in this group, 15 described themselves as fairly bilingual, and one as slightly bilingual.

Indeed, nearly half (19/40) thought that most French-speaking lawyers were handicapped because of language and three-quarters believed that this has some tendency to reduce the number of Quebec lawyers interested in practising in the Supreme Court. There were fewer who looked upon themselves as personally handicapped than who felt the Quebec profession was generally affected by language difficulties. Still slightly more than half did feel at some disadvantage because of language and about the same percentage thought the language problem serious enough to require some kind of reform.

It is interesting, however, to observe, when we correlate the answers to the different questions, that the group which desired reform did not include all of those who considered themselves either slightly or seriously handicapped because their first language was French. Six of those who felt under no handicap at all advocated reforms, while at the other extreme one of those who described himself as at a serious disadvantage because of language did not advocate any alterations in the Court's practice or personnel. Clearly to some extent the lawyers' attitude to Supreme Court reform would likely be conditioned by their temperament and basic social political outlook as well the way in which they have been affected by language difficulties when practising in the Court.

The most significant variation in the answers to the different questions occurred among the responses to question 20. Here, as might be expected, a much higher proportion of the fully bilingual lawyers than of the less than fully bilingual lawyers denied being under any personal disadvantage because of language. But what is surely more interesting than that contrast is that more than a third of the fully bilingual group did consider themselves at a disadvantage because of language. "Fully bilingual" was explained on the questionnaire to be the appropriate designation for those who "would not hesitate to plead a case in English." A number of the fully bilingual lawyers who appended notes or memoranda¹ to the questionnaire explained that while they would not hesitate to use English when pleading in the Supreme Court and were convinced that by doing so they improved their chances of winning their client's case, nevertheless found it difficult to communicate their argument adequately in English especially when they were concerned with expounding some aspect of Quebec's civil law.

We should also note that the lawyers who belong to fairly small partnerships or else practise alone tend to be

¹ A number of the lawyers who answered the questionnaire, added notes or memoranda in which they developed their views regarding the Supreme Court's inadequacies both as a bilingual and a bicultural institution.

less bilingual and consequently are more likely to feel handicapped because of language. When we correlated the answers to question 1 concerning the kind of practice each lawyer was engaged in with the answers to question 5 concerning their proficiency in English, we found that there was a direct relationship between bilingualism and the size of the firm.¹ Of the 14 lawyers who practised alone or else in a partnership of less than 5 lawyers, only 4 said they were fully bilingual, whereas 14 of the 20 lawyers who practised in larger firms and all of the lawyers employed by government - federal and provincial - described themselves as fully bilingual.

Another factor which appears to have some bearing on the difficulties encountered by French-speaking members of the Supreme Court bar is the lawyer's area of specialization. Although only about half of the lawyers in our sample described themselves as specialists,² Table 2b shows that among the specialists, those who concentrate on civil law cases have the highest frequency of language difficulties in the Supreme Court. All 7 of those who do the bulk of their work in the civil law field feel either severely or slightly handicapped by the language problems. Among this group of 7 were the two fully bilingual lawyers who stated that they

¹On the questionnaire the criterion of a specialist was stipulated as one who does half his work in a particular branch of law.

²Of course, it is probably true that the larger law firms naturally attract most of the Supreme Court business.

Lawyer's area of specialization

	Yes, serious	Yes, slight	No, none
civil law	3	4	
criminal law	2	1	3
commercial & corporation law		1	3
administrative & constitutional law		2	1
labour law		1	1

Language Difficulties of French-speaking Counsel
Specializing in Different Areas of Law

Table 2b

were at a severe disadvantage because of language when practising in the Supreme Court. Again this would suggest that besides the problems which the less than fully bilingual French-Speaking counsel encounters when pleading his case before a predominantly English-speaking court, there are serious difficulties encountered by the fully bilingual Quebec advocate when faced with the necessity of using English to argue points of law based on the Quebec Civil Code.



One of the variables which might have been expected to have had a bearing on the ease with which French-speaking lawyers practise in the Supreme Court, is the amount of experience which they have had in the Court. But whether experience was measured in terms of the number of years since a lawyer's first case in the Court or the total number of cases he has taken, we do not find any evidence of a very marked correlation between experience and language difficulties. For example, of the 21 lawyers who in answering question 20 indicated that they felt at some disadvantage - slight or severe - because of language, 12 had taken 5 cases or less in the Court and the remaining 9 had taken more than 5 cases. Again if we narrow this down to the 10 who felt severely handicapped, we find that 4 of this group have taken more than five cases and indeed three of them have been practising in the Court for more than a decade. Thus while there may be a slight tendency for the younger, less experienced French-speaking counsel to feel more encumbered by language difficulties in the Court, still it is evident that a number of leading Quebec counsel who have been taking appeals in the Supreme Court for ten years or more have not been able to make a completely satisfactory adjustment to the predominantly English-speaking character of the Supreme Court.

In questions 21 and 22 we asked the lawyers to indicate if they thought the language problem for French-speaking members of the Supreme Court bar was greater in certain kinds of cases or when certain judges were hearing the appeal. Only



15 specified some particular type of case which was apt to raise difficulties for French-speaking counsel. But there was no clear pattern to the actual fields designated: 8 different categories were mentioned - the largest group (4) simply referred to "questions of law"; 3 mentioned cases heard by more than five judges in which the Court would be overwhelmingly English-speaking and two specified appeals involving Quebec civil law. A much larger group, 24, replied affirmatively to question 22 indicating that language difficulties did vary with the composition of the bench. This provides some further evidence for the point made earlier¹ that even with the Court's existing personnel, the panels which are established for Quebec appeals could be so arranged as to minimize the difficulties experienced by French-speaking counsel.

While a clear majority of the lawyers believed that the language factor had some deleterious affects on French-speaking advocates in the Supreme Court, almost none of them reported that languages problems had deterred them from taking cases in the Supreme Court. Only one lawyer said that because of language he had dropped a case in which he would otherwise have acted as counsel before the Supreme Court (question 23). None thought that their firms had dropped cases for this reason (question 24) and all denied having ever been reluctant to advise a client to appeal a case to the

¹ See above, page 172.



Supreme Court because of language difficulties¹ (question 25). Only one of the French-speaking lawyers acknowledged that the language problem had ever prompted him to associate himself with an English-speaking lawyer when taking a case to the Supreme Court (question 26).

Finally turning to the Court's services, we find, first of all, that nearly all of the lawyers reported no experience of language difficulties in their dealings with the Court's administrative staff (question 27). This is a fairly clear indication of the quite high level of bilingualism represented among the Court's non-judicial personnel at all levels. Only two lawyers indicated that they had any difficulty at all - and one of these specified that he had found that some of the Court's library staff were unable to speak to him in French.

A considerably higher level of concern was shown with regard to the reports of the Court's judgments. 11 of the lawyers in their replies to question 28 indicated that the lack of official translations of the Supreme Court's decisions imposed a slight burden on them and 2 regarded the absence of official translations as a severe burden.²

¹ Although several in notes or letters attached to their questionnaires stated that their assessment of the Court's low facility in civil law matters had made them reluctant to take appeals to the Supreme Court.

² 5 of this group of 13 were fully bilingual, 7 were fairly bilingual and one, slightly bilingual.



While this means that a substantial majority did not feel inconvenienced by the lack of official translations, still we should note that an equally large majority (26/39)¹ in answering the next question stated that they thought some or all of the Court's judgments should be translated and almost the same number (24) in question 30(b) reported that they found the present treatment of language in the head-notes of the Reports inadequate. In sub-section (c) below where we report the reforms advocated by these lawyers we shall examine in more detail the changes recommended in the answers to questions 29 and 30 for introducing a higher degree of bilingualism into the Supreme Court Reports. Here we might note that the relatively high proportion of lawyers who favoured the introduction of translations and the extension of French head-notes side by side with the relatively low proportion who felt actually burdened by the absence of French translations or equivalents for the English-speaking material in the Supreme Court Reports would suggest that many of those who favour reform in this area do so more on the basis of principle than for the sake of their own personal convenience.

(b) Choice of Language by French-speaking Counsel

The middle portion of the questionnaire - questions 7 to 17 (inclusive) - was designed to provide some information

¹One lawyer did not answer this question.



on the actual use of language by French-speaking counsel when pleading cases in the Supreme Court of Canada. We wished to see not only what language - French or English - they chose for their written factums and oral pleadings but also how they explained this choice. Finally we were interested in discovering how French-speaking counsel's choice of language in Supreme Court proceedings might differ from their use of language when pleading in the Quebec Courts and if over time there had been any change in their choice of language for Supreme Court cases.

From the answers which we received to this section of the questionnaire a fairly clear (and rather predictable) pattern emerges. The replies to the various questions when put together indicate that the frequent participation of less than fully bilingual English-speaking judges in Quebec appeals causes many French-speaking counsel especially those who are fully bilingual to express themselves in English rather than French. The evidence further suggests that the less than fully bilingual French-speaking lawyers are relatively reluctant to use English but are most likely to feel constrained to use English in oral argument rather than in preparing their factums. We shall gain a little more insight into this pattern by looking briefly at the answers which we received to the various questions.

First, when we look at the factors which the lawyers acknowledged as influencing their decision to plead in French or English, we find that for both written and oral

pleadings, one factor stands out as the most decisive - the lawyer's assessment of the linguistic capabilities of the judges sitting for his case. Of all the factors which we listed in questions 7 and 10, the lawyer's estimate of the judges' linguistic abilities was the one most frequently checked as influencing the choice of language - 29 indicated that this factor had influenced their choice of language in preparing factums, and one more than that acknowledged it as affecting the choice of language in oral pleadings. Furthermore, the replies to questions 8 and 11 which asked for an indication of the factor which was regarded as most frequently influencing the lawyer's choice of language for factums and oral argument respectively, overwhelmingly pointed to the lawyer's calculation of the judiciary's linguistic capacity as the crucial factor. 22 of the 34 lawyers who could single out one factor as the most influential factor in deciding what language to use for the preparation of their factums, identified the judges' expected linguistic ability as the key variable; similarly for oral pleadings 24 of 34 named this same factor. For neither written nor oral pleadings was any other factor mentioned as most influential by more than 5 lawyers.

Where the French-speaking lawyer's decision to present his factum in English is based on his estimate of the languages spoken by the bench, his estimate will likely be based on a rather general speculation about the predominantly English-speaking character of the Court's personnel.

It would appear, for instance, that many of the lawyers anticipate a bench which will make it incumbent upon them to argue in English if they are going to maximize their client's opportunities and they therefore prepare their factums in English. We find that among the factors influencing the lawyers' choice of language for factums, the factor selected almost as often as the judges' linguistic capacity was the language the lawyer planned to use in oral argument. On the other hand in oral pleadings the lawyer's decision to express himself in English is apt to be based on his immediate perception of the judges' capacity for understanding his French. 19 of the lawyers indicated that the language spoken by the judges during the hearing influenced their own choice of language. Certainly a fully bilingual French-speaking lawyer questioned in English would likely reply in English. Further a Quebec lawyer who was not so confident about his competence in English might feel it necessary to address the bench in English in order to make the greatest impact on all of its members. Evidence of this is provided by the answers to question 22 which asked if the lawyer's language difficulties were greater before certain judges. 24 lawyers gave an affirmative answer to this question and a number of those who were among the fairly bilingual group added notes explaining the dilemma which confronted them when they had the impression that two or three members of a five-judge bench would not be able to follow them if they argued only in French.

With one exception all of the other factors which we suggested as possible grounds for the choice of language for either factums or oral pleadings were considered significant by only a minority of the lawyers in our sample.¹ The one exception was the lawyer's own language capabilities. Those lawyers who are only fairly bilingual, regardless of how they estimate the judges' ability to follow them in French, might hesitate to use English. Indeed all but one of the 10 lawyers who denied that their choice of language was ever influenced by their assessment of the judges' linguistic ability pleaded all of their cases in French and seven of these were less than fully bilingual.

Further evidence of the extent to which the lawyer's linguistic ability will influence his choice of language is provided by the data set out in Table 2c. In this table we have set out the answers received to questions 9 and 12 in which we asked the lawyers to indicate the actual language or mixture of languages which they have used for written and oral pleadings respectively. We have separated the replies of the fully bilingual lawyers from those given by the group who stated that they were less than fully bilingual. The figures show that it is the fully bilingual lawyer who is most apt to adjust to the situation he anticipates in the

¹The number of times each of the factors was checked is shown in Appendix II in questions 7 and 10.

		Choice of Language for Factums					Choice of Language for Oral Pleadings						
		2	3	4	5	Always English	Usually French	Always English	Usually French	2	3	4	5
1	Always French	Usually French	$\frac{1}{2}$ French & English	$\frac{1}{2}$ English		Always French	Always French	Usually French	Usually French	$\frac{1}{2}$ French & English	Usually English	Always English	Always English
Fully Bilingual Lawyers	2	5	2	8	7	1	4	5	5	10	4		
Fairly or Slightly Bilingual Lawyers	11	2	1	1	1	8	5	3	3	0	0		
Totals	13	7	3	9	8	9	9	8	8	10	4		

Choice of Language by French-speaking Quebec Counsel for Factums and Oral Argument in the Supreme Court of Canada

Table 2c

Supreme Court and plead his case in English. In preparing their factums most of the fairly or slightly bilingual lawyers (11/16) used French exclusively, whereas nearly all of the fully bilingual group (22/24) wrote some factums in English and well over half (15/24) used English for most of their factums. In oral pleadings this contrast was not quite so sharp: here the use of English by a member of the bench or by the lawyer representing the other side of the case has the effect of inducing more of those who are not fully bilingual to use some English. We can also see by comparing the totals for the choice of language for factums with the totals shown for oral argument that the actual court room situation during a hearing with a mixture of French- and English-speaking judges sitting for a case is more likely than the written stage of proceedings to elicit a mixture of languages in the lawyers' presentations. In writing factums over half (21/40) either always used French or always used English, whereas in oral pleadings 27 of the 40 used French and English.¹

One reaction to this phenomenon might be to praise the linguistic dualism of the Supreme Court's bench as prompting bilingual performances on the part of its bar. But such a reaction would have to ignore the fact that it is only French-speaking counsel who feel constrained or are induced

¹This difference is significant ~~at~~ the 5% level.

to use both French and English during Supreme Court hearings - an English-speaking lawyer who is less than fully bilingual will not experience the same constraint or incentive to express himself in French. A more realistic reaction would be to take note of the fact that it is in the oral stage of proceedings that French-speaking counsel most often feel obliged to use their second language, English. It might then be argued that if this means that some French-speaking lawyers are prevented from presenting their client's case in the most effective manner and if this situation cannot be overcome, at least in the short-run, by staffing the Court with more bilingual personnel, then the most immediate way in which the French-speaking counsel's difficulties might be lessened would be through the provision of some kind of translation system during oral argument.

The replies we received to questions 14 and 15 provide further confirmation of the Supreme Court's present tendency to incline French-speaking lawyers, who would normally plead in French, to use English when taking appeals to the Supreme Court. In question 14 we asked the lawyers to indicate their general use of language when practising in the Quebec Courts. 22 replied that they always used French and the other 18 stated that they usually used French. There was no significant difference here between the fully bilingual group and those who were less than fully bilingual. In question 15 we tried more specifically to see if lawyers actually switched from French into English when taking appeals to the Supreme Court. In

Table 2d we have set out the results from this question and from this we can see that almost all of those lawyers who pleaded cases in English before the Supreme Court generally pleaded the same cases in French in the Quebec Courts. All but three of those to whom question 15 was applicable stated that in the Quebec Courts they had used French for all or most of those cases in which at the Supreme Court level they later used English. This tendency was much more marked among

	Of those cases in which you have used English (for either your factum or oral argument) have you pleased any of them in French before the Quebec Courts?				
	Yes, all	Yes, most	Yes, a few	No, none	Not applicable
Fully Bilingual Lawyers	5	14	2	1	2
Fairly or Slightly Bilingual Lawyers	7	3	0	0	6
Totals	12	17	2	1	8

French-speaking Lawyers Choice of Language in Quebec Courts for Cases in Which English Used in The Supreme Court

Table 2d

the lawyers who are less than fully bilingual, which is of course what we should expect, given that this group of lawyers are the ones who are apt to use English in the Supreme Court only because they feel constrained to do so.

The pattern of responses to questions 14 and 15 enables us to further isolate factors inherent in the Supreme Court itself which tend to influence the French-speaking lawyer's decision to express himself in English before the Supreme Court. The factors inherent in any given legal controversy which might influence the choice of language should be equally operative in both the Supreme Court and the Quebec Court. But if that is true, then those factors inherent in the case rather than in the Court, factors such as the subject matter of the case, the client's or adversary's language and the language used in the judgment or pleadings below - cannot account for the striking contrast between French-speaking counsel's choice of language in the Quebec Courts on the one hand and in the Supreme Court on the other. Whereas at least half of the French-speaking lawyers used English half the time or more in the Supreme Court not one of them used English this often in the Quebec Courts. The key explanation of this contrast must be the linguistic capabilities (actual or expected) of the Supreme Court judges.

We also tried to ascertain if there was any difference between French-speaking counsel's linguistic experience in the Supreme Court and their use of language in Canada's

former final appellate court, the Judicial Committee of the Privy Council. However, since our questionnaire revealed that only two lawyers in our sample had taken cases before the Judicial Committee, we were not provided with the basis for making such a comparison. For the record we might report that of the two who had taken appeals to the Privy Council, one felt that there had been a difference in the use of language vis-a-vis the Supreme Court, which was that his Privy Council "briefs" were prepared in English whereas his Supreme Court factums are written in French.

Finally in this section of our questionnaire dealing with the lawyer's actual choice of language we tried in question 17 to ascertain if there had been any tendency for the pattern of language use to change over time, towards greater use of French or English, and if so to see how the lawyers accounted for such changes. Only 13 of the 40 lawyers who returned questionnaires answered this question. 12 of these reported that they had presented more of their Supreme Court cases in French in recent years and one stated that he had tended to shift to a greater use of English. The latter did not give any explanation for his increased use of English. 9 of the 12 who reported a greater inclination to plead in French offered explanations for their change. 6 of these explanations were couched in nationalist terms, using such phrases as "the spirit of the Quiet Revolution", "the fear of separatism" and "duty to mother tongue". The other three referred to a greater use of French

by the Court resulting from either the increased specialization of the Quebec judges in Quebec appeals or the increased silence of the monilingual English-speaking judges assigned to Quebec cases.

It is interesting to observe that 5 of the 6 lawyers who offered nationalist explanations for their growing determination to plead cases only in French were less than fully bilingual. This suggests that it is among the segment of the Quebec legal profession which is not fully assimilated with English-speaking culture that disgruntlement with the linguistic inadequacies of the Supreme Court bench is most intense. As we suggested at the beginning of this section, it is this part of the Quebec profession that is probably under-represented among those Quebec lawyers who practise in the Supreme Court. But if the proportion of French-speaking Quebec Canadian-lawyers who are not assimilated into the English-speaking culture rises as it is likely to do given the decreased rate of assimilation of the French-speaking Quebec population over the last few decades,¹ then this is likely to produce an increase in the proportion of French-speaking members of the Supreme Court bar who are not fully bilingual. Such a change in the composition of

¹ See K.W. Kim, "French-Canadian Nationalism: A Quantitative Analysis", in Peter Russell (ed.) Nationalism in Canada, (McGraw-Hill of Canada to be published, June 1965).

the Quebec section of the Supreme Court bar without any basic alteration in the reception which French-speaking lawyers now experience in that Court could only lead to a greatly intensified and broadened sense of dissatisfaction.

(c) Proposals for Reform

The concluding part of our questionnaire asked for the lawyers' opinions on both the need for reform and the kind of reform for dealing with the language problems associated with Supreme Court practice. Before proceeding to an examination of the suggestions made in answer to our general question about possible remedies to the language difficulties associated with Supreme Court practice we shall look at the replies to our specific queries about the treatment of language in the Supreme Court Reports. As we have seen the Reports represent the one area in which some effort has recently been made to introduce more French or even more bilingualism in the Supreme Court's operations.¹ We thought it would be worthwhile to see what response there had been to these efforts among the Court's French-speaking counsel and how far, if at all, there might be a desire to see such efforts extended.

¹ See above our description of recent developments in the treatment of head-notes at pp. 238 - 240.

We have already reported above² that only a small minority (13/39) of the lawyers felt under any kind of handicap as a consequence of the largely English-speaking nature of the Court's official reports, but that a majority (26/39) favoured the Court's providing official translations of some or all of its judgments (presumably translations of English judgments into French). This apparent discrepancy becomes more understandable when we bear in mind that the lack of French translations especially of judgments concerning issues of great importance to Quebec or Canada affects the entire French-speaking community and not simply those French-speaking lawyers who practice in the Supreme Court of Canada. Many of those who advocated translations might well have been thinking of this much larger French-speaking community whose legal system is decisively affected by the Supreme Court's decisions. We should also note that four of the lawyers who advocated translations but who reported that they themselves were not seriously handicapped by the absence of such translations, were among the group who in answer to earlier questions had explained their own increased tendency to use French in the Supreme Court in terms of their sympathy with the nationalist ferment in French Canada.

The answers we received to questions 28, 29 and 30 concerning the treatment of language in the Supreme Court Reports would indicate that while the rather halting and

spasmodic introduction of French and bilingual head-notes has been appreciated it is not regarded as an adequate reduction of what to date has been the almost complete monopoly of English in the Court's official reports. 32 of the lawyers reported that they had found the new treatment of head-notes helpful but three-quarters of these lawyers thought that the bilingual head-notes should be extended to more cases. The advocates of both the translation of judgments and the provision of bilingual head-notes generally favoured applying these policies to all of the Court's judgments. 16 would have translations for all judgments and 18 favoured bilingual head-notes for all judgments. A smaller group was more discriminating and specified particular areas of law which required more bilingualism in the Court's reports. For both the translation of judgments and bilingual head-notes the suggestions covered two general fields: cases dealing exclusively with matters of Quebec law and those dealing with issues of importance to all of Canada, especially constitutional law, criminal law and federal public law. A number of lawyers advocated bilingual head-notes and translation of judgments into French (or English) in both these fields. This dual proposal of bilingual head-notes and French translations for judgments dealing exclusively with Quebec law or with matters of general concern to the whole country would appear to represent the minimal expectation of the majority of our sample of French-speaking lawyers.

In our final question we posed the general question of remedies for the language problem: was the language problem serious enough to call for reforms of the Supreme Court itself or its position in the Canadian judicial structure, and if so, what reforms were needed? As we have shown above in Table 2a, just over a majority (22/40) favoured reform. Among the group who advocated reform there was a wide variety of specific proposals, and some lawyers made two or three different suggestions. A considerable number wrote quite lengthy memoranda presenting very thoughtful analyses of the Supreme Court's shortcomings from the point of view of the French-speaking Quebec lawyer.

Rather than advocating the introduction of translation services into the Court's proceedings to compensate for the lack of complete bilingualism on the Court's bench, nearly all the proposals attacked the language problem directly by recommending changes in the Court's composition or a reorganization of its personnel. 9 lawyers simply insisted that all Supreme Court justices should be fully bilingual, but 10 went further than this and while they too aimed at insuring that the judges hearing Quebec appeals should be able to follow French-language pleadings, to achieve this they called for a two chamber, common law - civil law, division of the Court. Most of those who made this two-chamber proposal or variations of it stipulated that the Court would have to have at least 5 French-speaking jurists on its bench to staff its civil law-Quebec chamber, but

7 of these also explained that they viewed such a reform not so much as a solution to the French-speaking lawyer's language difficulties but a means of providing a knowledgeable panel of at least 5 judges to review the decisions of Quebec's Court of Queen's Bench. Two lawyers pushed this point of view a step further and recommended terminating all appeals from the Quebec court of last resort except in matters of federal and constitutional law.

Only a very few lawyers showed any interest in reforms other than those designed to increase the French-speaking civilian talent on the Court's bench. Two recommended the adoption of simultaneous translations of oral argument from French into English; one suggested making bilingualism a requirement for lawyers who wished to practise in the Court and one suggested the alteration of French and English-speaking Chief Justices.

The interest shown in the establishment of a separate specialized division of the Supreme Court for handling Quebec appeals demonstrates how the classical Quebec protest against the Court - the distrust expressed by Quebec jurists since pre-Confederation days in the competence of a predominantly Anglo-Saxon common law Supreme Court for reviewing the decisions of Quebec courts dealing with Quebec's distinctive system of civil law - is still the principal source of discontent with the Court. A number of the lawyers in the notes they attached to this questionnaire explained that they could not separate the question of language from the question

of the Supreme Court's effectiveness in adjudicating cases concerning Quebec civil law. Again no specific cases were cited to illustrate the deleterious effects of the Supreme Court's decisions in this area, although a few lawyers offered a very critical analysis of the background and skills of the judges who sit for Quebec appeals (including the three civilian jurists who are currently members of the Court) comparing them very unfavourably with the judges on Quebec's Court of Queen's Bench.

While we certainly cannot ignore the extent to which the language problem in the Court and the problem of providing an appropriate appellate body for Quebec civil law are closely intertwined, still it does not seem to follow that the dual chamber division of the Supreme Court or even the reduction of the Court's jurisdiction in cases involving only Quebec provincial law would provide a complete remedy for the linguistic inadequacies of the Supreme Court. As we argued above¹ even if the Court were reconstituted or its jurisdiction reduced so that its English-speaking members were relieved of any responsibility for participating in decisions bearing upon issues confined to Quebec's local law, there would still remain a range of national legal issues for which English and French jurists would have to sit together and which would certainly involve litigation by citizens and counsel from Canada's two major linguistic

¹ See above, pages 229-30.



groups. Evidence of the seriousness of the language problem in this type of case is provided by the lawyers' answers to our question 21 in which we asked if the French-speaking lawyer's difficulties were most severe in some particular kind of case. 15 lawyers answered this question in the affirmative and 9 of these specified cases involving issues which went beyond purely provincial legal matters; 3 mentioned criminal law; 2 - constitutional law; 3 - cases heard by more than 5 judges¹, and 1 - cases involving the interpretation of federal statutes. Even with a drastic reconstruction of the Supreme Court along the lines demanded by the Court's civilian critics cases of this kind raising matters of national importance will continue to be heard by a federal tribunal staffed by English-speaking and French-speaking jurists. A language problem will continue to exist in such a Court so long as all of its members are not fully bilingual, or in lieu of that, adequate translation services are not provided in its proceedings.

¹ Table 1c above shows that most of the cases heard by more than 5 judges deal with criminal law or constitutional law.



Chapter IV

Quantitative Analysis of Supreme Court Decisions

1. Scope of Study

The main aim of this section is to see whether a purely quantitative analysis of the Supreme Court's decisions and the voting patterns of its judges points to any aspect of the court's work which may affect or be influenced by bicultural factors. In particular we shall examine statistically the Supreme Court's disposition of appeals from the provincial courts and look for any difference between its disposition of Quebec appeals and its treatment of appeals from the other provinces. The voting of the judges will be studied with a view to discovering in which areas, if any, cultural or provincial blocs are operative in the Court's decisive making. We shall also try to measure quantitatively the role which common law and civil law judges have played throughout the Supreme Court's history in various categories of Quebec law-suits. All of this will be prefaced by a statistical examination of the general nature of the Court's work in terms of both the source and nature of the Court's case-load.

There are, of course, very serious limitations to the extent to which judicial behaviour can be usefully quantified. Those forms of quantitative analysis consider only the bare outcome of judicial decisions and not the

complex process of reasoning which supports judgments. That is certainly true of the techniques used in this study. Thus, this kind of study can reveal very little about the character of the Court's jurisprudence. What it can indicate are some of the relationships which may exist between the court under study and other courts, institutions or groups as well as relationships which may hold among the members of its bench. Also, of course, this type of quantitative study may provide negative evidence which suggests that suspected relationships do not in fact, exist. But even where the statistical evidence is positive it can at best be regarded as providing stronger grounds for believing an explanation of the court's decision-making which was arrived at through detailed qualitative analysis of its decisions or else as producing an hypothesis about the court which may direct research to an examination of the role which specific and heretofore unexamined factors have played in its decision-making. It is for these reasons that in the next section we have added to the purely quantitative analysis a more traditional qualitative study of the court's leading decisions in those areas where the quantitative study suggests that significant bicultural factors may be at work.

2. Source of Data

With one exception, which we shall note below, this study is confined to the Supreme Court's reported decisions



since 1949. More precisely it covers all the decisions in the Supreme Court Reports from the volume [1950] S.C.R. up to (and including) all available parts of the volume [1964] S.C.R. as of December 31, 1964. The data was assembled in the form of answers to a questionnaire. The questionnaire, (a copy of which, showing the quantitative results for each question, appears as Appendix III to this report), was applied to each case. Included in the questionnaire were a number of purely mechanical questions, such as the source of the appeal, whether it was reversed or affirmed and the voting of the judges. The answers to these questions were reasonably straightforward and involved little subjective judgment on the part of the research assistant administering¹ the questionnaire.²

¹The research assistant was Mr. John Cavarzan, who was recently awarded the Master of Laws degree and has taken a teaching appointment at the University of Manitoba Law School. He was guided in his work by The Director of this Project and Professor Harry Arthurs, of Osgoode Hall Law School.

²There are some exceptions to this. For instance, because of the number of separate issues which are involved in a case it is not always clear whether particular judges can be said to have assented or dissented. Here the policy was to assess the major issue in the case and regard the judge's treatment of that issue as determining whether he assented or dissented.

However, other questions involving, for instance, the classification of the case into a particular category of law or identifying a question involving civil liberties, morals or religion etc.¹ called for judgments on the part of the person administering the questionnaire which would of necessity be less objective. While we must acknowledge the subjective element that undoubtedly entered into such judgments, it is our belief that these judgments were made in a consistent and reasonable way and that the margin of controversy or choice open to the person answering these questions was not large enough to seriously jeopardize the validity of this statistical study.

The only pre-1949 cases considered here are Quebec appeal cases. Section 6 of this quantitative study surveys some very basic aspects of Quebec appeals from the Supreme Court's very beginning right up to the present day. The reason for confining the bulk of our quantitative research to post-1949 cases, aside from considerations of time and cost, was simply that it is only since 1949 that the Supreme Court has been Canada's final court of appeal.² Thus it is

¹See, for example, questions 38 to 44.

²There are some exceptions to this. Following 1949 a case in which the litigation had commenced prior to the abolition of Privy Council appeals might still be appealed to the Privy Council. Thus in a number of cases included in this study an appeal still lay to the Judicial Committee.

only in this period that the Court has functioned as Canada's highest judicial tribunal. On the other hand it seemed worthwhile, in view of the long history of Quebec concern over the Court's treatment of Quebec civil law, to extend the statistical summary of the Supreme Court's treatment of Quebec law-suits back to the Court's earliest days and trace any significant fluctuations which have occurred over time.

It is important to note that this study considers only the Supreme Court's reported decisions. This means that only about half of the Court's case load is covered by this study. In the 15 year period from 1950 to 1964 there were 1031 reported decisions. 30 of these were "motions" in which the Court simply decided to grant or deny leave to appeal or to rehear a case; the remaining 1001 were ordinary "judgments". But for this same 15 year period 415 unreported judgments are listed. Before 1957 the law reports did not provide lists of the Court's motion work, but after 1957 for the 7 years up to the end of 1964 approximately 300 unreported motions are listed.

The omission of unreported judgments and motions introduces a significant bias into the sample of the Supreme Court's decisions considered in this study. While it is difficult to determine precisely the policy pursued by the editors of the official reports in selecting decisions to be reported, at the very least it can be said that the editors try to include all important questions of law settled

by the Court or issues having a general application to all of Canada. Further, a review of the reported material¹ indicates that the reported decisions include all reference cases, most criminal appeals and most cases on which the court is divided in opinion. On the other hand, the great majority of the Court's unreported judgments involve cases in which the Court dismissed the appeal. Indeed an examination of the Court's minute book indicates that about one out of every eight appeals brought before the Court is dismissed from the bench without reasons. Also with regard to motions, most of those ~~that~~ remain unreported are in cases where leave to appeal was refused. All of this suggests that by confining our attention to reported decisions we include in our sample a higher proportion of significant and controversial cases and a higher proportion of cases in which the Supreme Court differs from lower courts, than would be present in the whole population of Supreme Court decisions. This bias must be kept in mind in interpreting the results of the study.

3. Nature of the Court's Work

As a preface to our quantitative analysis of particular aspects of the Supreme Court's work it is worthwhile to look briefly at figures which show the overall nature of the

¹ See John J. Cavarzan, 'Civil Liberties and the Supreme Court: The Image and the Institution', above, page 106, footnote 2, pp. 14-16.



Court's work. After seeing the general character of the Court's work load we should be in a better position to appraise the Court's function as an institution as well as some of the key factors which now determine the kind of decision-making with which the Court is preoccupied.

For this study the initial way in which the legal issues dealt with by the Court were classified was in terms of the four-fold division of private law, constitutional law¹, non-constitutional public law and criminal law. This, of course, is a very simple classificatory scheme and in practice it is often extremely difficult to apply one, and only one, of these classifications to the subject matter of a case which might involve considerations falling under all four headings.² Nevertheless, even allowing for a considerable margin of error in applying this scheme to the complex issues before the Court it does provide a fairly clear and simple indication of the kind of judicial work the Supreme Court does. If we look at Table 3 we can see at the bottom of the vertical columns 1 to 5 the total number of reported cases in each area of law handled by the court from 1950 to 1964. The most significant feature of these figures is that 668 or 65% of the Court's 1031 reported decisions during this period were in the area

¹ By constitutional law cases here we mean cases in which the sole issue is whether or not a law is ultra vires.

² Some cases were impossible to place under one of the four headings. These cases were placed under "other".

	<u>Types of Law</u>					Total
	(1)	(2)	(3)	(4)	(5)	
						Public Crim-
						Private Constitu- non- inal Other Total
						tional Const.
(1) Supreme Court's Original Jurisdiction	-	-	-	2	3	5
(2) Supreme Court Reference Case	1	3	1	-	2	7
(3) Appeal from Federal Courts - Decision Affirmed	37	1	57	-	1	96
(4) Appeal from Federal Courts - Decision Reversed	28	1	48	-	-	77
(5) Appeal from Provincial Court on leave granted by Sup. Ct. Decision Affirmed	32	4	9	43	-	88
(6) Appeal from Provincial Court on leave granted by Sup. Ct. Decision Reversed	40	1	4	40	-	85
(7) Appeal from Provincial Court on leave granted by Prov. Ct. Decision Affirmed	40	3	12	-	-	55
(8) Appeal from Provincial Court on leave granted by Prov. Ct. Decision Reversed	35	7	4	-	-	46
(9) Appeal as of right from Provincial Court - Decision Affirmed	276	8	16	30	-	330
(10) Appeal as of right from Provincial Court - Decision Reversed	167	4	10	25	-	206
(11) Appeal in forma pauperis	4	-	-	-	2	6
(12) Motions	8	1	3	9	9	30
Total	668	33	164	149	17	1031

Table 3
Supreme Courts Case-Load 1950 - 1964

of private law. This means that the Supreme Court spends the greater part of its time settling controversies between private individuals and groups. Most of these private law cases would likely involve legal matters subject to provincial legislative jurisdiction. Thus it is clear that any attempt to implement the federalist reform of the Supreme Court's jurisdiction and curtail its authority to review provincial court decisions in provincial law matters would have a very drastic effect on the character of the Court. On the other hand when we look at public law cases, it is apparent that the great bulk of these concern matters which are clearly of federal significance: of the non-private law cases, over 85% involve constitutional law, appeals from the federal courts and criminal law.¹

The other facet of the information presented in Table 3 which deserves some comment is what it reveals about the determinants of the Court's docket. The most important point to note is that a little over half of the cases reached the Supreme Court by way of appeals ~~as of right~~. This in itself shows how limited is the Supreme Court's control over its own docket. We should further note that the provincial courts, exercising the power to grant special leave to appeal under section 38 of the Supreme Court Act continue to have ~~some~~

¹Of course, some criminal cases concern provincial penal sanctions.

influence on the Court's case-load.¹ In the 15-year period under consideration here 111 or a little more than 10% of the court's reported decisions were in cases which came to the Court as the result of provincial court decisions to grant leave to appeal.

One other important point emerges when we compare the Supreme Court's disposition of appeals which reach it by way of leave granted by either provincial courts or the Supreme Court with its treatment of appeals which are not judicially screened but simply reach the Court as a matter of right. In the former where either the provincial or Supreme Court granted leave to appeal (rows 5,6,7 and 8 in Table 3) the Supreme Court reversed the provincial court just about as often as it affirmed the decision of the lower court. In 143, or 52%, of 274 such appeals the Supreme Court confirmed the provincial court decision. However, in appeals as of right there was a significantly greater tendency for the Supreme Court to confirm the provincial court decision. In 330, or 62% of these appeals as of right the decision of the provincial court was upheld by the Supreme Court. The difference between these two rates at which the Supreme Court affirmed lower court decisions is significant at the 5%

¹ See above pp.106-113, for a summary of the rules governing the Supreme Court's jurisdiction.

level.¹ Certainly the most obvious explanation of the difference is that the rules which now give dissatisfied provincial litigants an automatic right of access to the Supreme Court (especially the provision of an appeal as of right in cases involving over \$10,000) bring to the Court an abnormally large number of cases which do not contain highly significant or controversial issues and in which the Supreme Court merely rubber-stamps the decisions of provincial courts.²

The Supreme Court then should be contrasted with the highest appellate courts of the United States and Great Britain in terms of both its control over its own docket and the relative weight of nationally important issues in its caseload. In both England and the United States the dockets of the highest appellate courts are to a very high degree within

¹ i.e. if we were wrong in inferring that this difference is caused by the greater number of non-meritorious appeals which reach the Supreme Court through appeals as of right, the chance of getting the result we report would be no greater than 5%.

²We might also note that in the fields of both private and non-constitutional public law. The Supreme Court reversed relatively fewer lower court decisions than it did in criminal and constitutional appeals. In the former areas the lower courts were reversed in 41% of the appeals, whereas in criminal appeals the reversal rate was 47% and in constitutional cases 45%. However, the difference between the two former fields and the two latter in this respect is only significant at the 20% level.

the control of the judges. The British House of Lords hears a relatively small number of cases and this is mainly explained by the fact that an appeal can be taken to that court only by leave of the court below or of the House of Lords itself. Also in the United States a series of statutes culminating in the Judiciary Act of 1925¹ greatly reduced appeals as of right and gave the Supreme Court a very large measure of control over its own docket. As a recent judicial study of these features of appellate courts has noted the objective of this development "was to allow it [i.e. the Supreme Court] to concentrate its energies on crucial questions of nationwide concern."²

The contrasting situation in Canada means that the Supreme Court spends a great deal of time hearing cases which hardly merit adjudication by the nation's highest judicial tribunal. The amount of time it spends on what might be called non-meritorious appeals, coupled with its generosity in allowing time for oral arguments and its lack of professional research assistance by law-clerks seriously reduces the amount of attention which the Supreme Court can give to those legal issues which are of greatest significance to the country. It might also be argued, if one hankers for a more activist, statesmanlike Court, that the constant adjudication of rather

¹28 U.S.C. No. 1254-57.

²Delmar Karlen. Appellate Courts in the United States and England, p. 60.

mundane and insignificant disputes between private citizens is not likely to produce the habits of mind and judicial techniques required of judges who are expected to take a creative lead in adjusting the country's legal fabric to the changing needs of a complex society.

4. Disposition of Provincial Appeals

In terms of the Supreme Court's relationships to other institutions, certainly the most critical of these relationships is that between it and the provincial courts. As Canada's general appeal court, by far the largest part of its work is concerned with reviewing the decisions of provincial courts of last resort. In the 15 year period which we are analyzing here just under 80% of its reported decisions were in provincial appeals. Thus it seemed worthwhile to break-down its appellate record on a provincial basis in order to discover if there was any evidence to suggest that there was a significant variation in the Supreme Court's relationships to the various provincial court systems and, in particular, if there was anything distinctive about the Supreme Court's relationship to the Quebec courts.

In Table 4 for the Supreme Court's provincial appeals from 1950 to 1964 decided on the merits we have cross-tabulated the origin (in terms of how the case came to the court) and disposition of cases with the provinces from which cases were appealed. The first thing to note about this table



is that it indicates an absence of any significant difference on a provincial basis in the Supreme Court's disposition of appeals. Aside from Newfoundland and Prince Edward Island which produced too small a number of appeals to provide any basis for statistical generalization, the rate at which the Supreme Court reversed the decisions of lower courts varied very little from province to province ranging from a low of 38% for Quebec and Ontario to a high of 48% for British Columbia. But this table does not distinguish between different kinds of law and legal issues. Later as we shall see in examining the data presented in Table 5 a comparative analysis of the Supreme Court's appellate record on a provincial basis does produce some more significant results when we refine the data concerning the Court's appeal cases into different classifications of law.

The one interesting point that Table 4 does reveal relates not to the Supreme Court's disposition of provincial appeals but to the frequency with which the provincial courts grant leave to appeal to the Supreme Court. Here, as the figures in rows 3 and 4 indicate, the court of highest resort in Quebec has granted leave to appeal its decision proportionately far less often than have its counterparts in the other provinces. Indeed whereas in the other provinces appeals granted by leave of the provincial court account for 12% of all appeals, such appeals account for only 4% of Quebec's total. This difference is significant at the level of 1/10th

Province Appealed From

Nfld. P.E.I. N.S. N.B. Que. Ont. Man. Sask. Alta. B.C. Totals

Disposition of Appeals								Origin and Disposition of Provincial Appeals by Supreme Court, 1950-64			
On Trial and Disposition of the Case on the Merits								Table 4			
(1) Appeal from Provincial Court on lv. granted by Sup. Ct. Decision Affirmed	1	1	2	24	35	5	3	4	12	87	
(2) Appeal from Provincial Court on lv. granted by Sup. Ct. Decision Reversed	1	3	24	25	4	5	2	21	85		
(3) Appeal from Pro- vincial Court on lv. granted by Pro- vincial Court Decision Affirmed	2	2	1	4	20	1	6	5	12	55	
(4) Appeal from Pro- vincial Court on lv. granted by Provincial Court Decision Reversed	—	—	—	4	6	13	5	3	4	46	
(5) Appeal as of right from Provincial Court Decision Affirmed	1	6	10	120	91	13	17	32	40	330	
(6) Appeal as of right from Provincial Court Decision Reversed	1	2	6	5	61	54	9	15	24	28	205
(7) Appeal in forma pauperis	—	—	—	—	—	3	1	—	—	4	
Total	3	4	15	28	239	241	38	49	71	124	812

of 1%. Of course, this difference might be explained by the relative lack of interest on the part of Quebec litigants in applying to the provincial court for leave to appeal. But the figures for appeals as of right - 181 from Quebec as compared, for instance, with 145 from Ontario - and for appeals on leave granted by the Supreme Court - 48 for Quebec as compared with 60 for Ontario - do not suggest that Quebec litigants are less zealous than those of other provinces in pressing their claims for access to the Supreme Court. It seems that the more plausible explanation might be the relative reluctance of Quebec judges to have their decisions reviewed by the Supreme Court. Such an explanation becomes understandable when we bear in mind not only the classical Quebec view, shared by many of the provinces' jurists, that the Supreme Court compared to Quebec's highest Court is relatively unqualified for handling civil law issues, but also when we examine some of the special areas in which the Supreme Court is most apt to be at odds with the Quebec courts.

The figures shown in Table 5 reveal how some significant differences between the Supreme Court's treatment of Quebec appeals as compared with its treatment of appeals from the other provinces emerge when we examine the Court's appellate record in particular kinds of legal issues. When we compare Quebec appeals with those from the other provinces over the whole spectrum of cases, we find very little

quantitative difference between the Supreme Court's treatment of Quebec appeals and its disposition of those from the other provinces. As column 1 in Table 5 shows, the Quebec courts, overall, were reversed in only 38% of the cases as compared with an aggregate reversal rate of 45% for the other provinces (row 11). But in columns 2 and 3 we have recorded the percentage of Supreme Court reversals in the two areas - civil liberties and "other bicultural issue cases" - in which one might expect to encounter a marked difference of attitude between the Quebec courts and the Supreme Court's majority. Although the numbers of cases falling under each of these categories are quite small, still there is a very wide difference between the reversal rates for Quebec and those for the other provinces. In bicultural issue cases the contrast is greatest - appeals from Quebec courts being granted in 75% of the cases as compared with 44% for the other provinces. This difference is significant at the 5% level. In civil liberties cases the difference is less marked - 60% for Quebec as compared with 38% for other provinces - which is significant only at the 10% level.

Now a word of explanation is required about some of the terms used in the above comparison. The data in columns 2 and 3 of Table 5 on civil liberties and other bicultural issues cases are derived from the answers given to question 11 of the questionnaire which was applied to each of the



	1. All Cases	2. Civil Liber- Cases	3. Other Bicul- lar Cases	4. Crim- inal Issues	5. Consti- tutional Law sue Cases	6. Non consti- tutional Law	7. Pri- vate pub- lic law
1. Quebec		$\frac{91}{239} (.38)$	$\frac{9}{15} (.60)$	$\frac{9}{12} (.75)$	$\frac{18}{31} (.38)$	$\frac{4}{5} (.80)$	$\frac{2}{9} (.22)$
2. Newfoundland		$\frac{1}{3} (.33)$	0	0	0	0	$\frac{1}{3} (.33)$
3. P.E.I.		$\frac{2}{4} (.50)$	0	0	$\frac{0}{1} (.00)$	$\frac{1}{1} (1.00)$	0
4. Nova Scotia	$\frac{7}{15} (.47)$	$\frac{0}{1} (.00)$	$\frac{0}{1} (.00)$	$\frac{1}{2} (.50)$	$\frac{0}{1} (.00)$	0	$\frac{6}{12} (.50)$
5. New Brunswick	$\frac{12}{28} (.43)$	$\frac{1}{3} (.33)$	$\frac{0}{2} (.00)$	$\frac{1}{3} (.33)$	$\frac{2}{3} (.67)$	$\frac{1}{4} (.25)$	$\frac{11}{19} (.58)$
6. Ontario	$\frac{92}{238} (.39)$	$\frac{8}{22} (.36)$	$\frac{5}{13} (.46)$	$\frac{19}{45} (.42)$	$\frac{2}{8} (.25)$	$\frac{9}{24} (.38)$	$\frac{63}{167} (.38)$
7. Manitoba	$\frac{18}{37} (.49)$	$\frac{3}{4} (.75)$	$\frac{2}{2} (1.00)$	$\frac{6}{11} (.55)$	$\frac{2}{6} (.33)$	$\frac{1}{1} (1.00)$	$\frac{9}{18} (.50)$
8. Saskatchewan	$\frac{23}{49} (.47)$	$\frac{0}{1} (.50)$	0	$\frac{2}{2} (1.00)$	$\frac{3}{6} (.50)$	$\frac{2}{4} (.50)$	$\frac{18}{40} (.45)$
9. Alberta	$\frac{30}{71} (.42)$	$\frac{0}{2} (.00)$	0	$\frac{3}{15} (.20)$	$\frac{1}{3} (.33)$	$\frac{1}{2} (.50)$	$\frac{25}{51} (.49)$
10. British Columbia	$\frac{60}{124} (.48)$	$\frac{6}{15} (.40)$	$\frac{4}{7} (.57)$	$\frac{14}{27} (.52)$	$\frac{2}{8} (.25)$	$\frac{2}{10} (.20)$	$\frac{43}{83} (.52)$
11. (Rows 2 to 10) All Provinces except Quebec	$\frac{245}{569} (.43)$	$\frac{18}{48} (.38)$	$\frac{11}{25} (.44)$	$\frac{46}{106} (.43)$	$\frac{13}{36} (.38)$	$\frac{16}{45} (.36)$	$\frac{176}{395} (.45)$

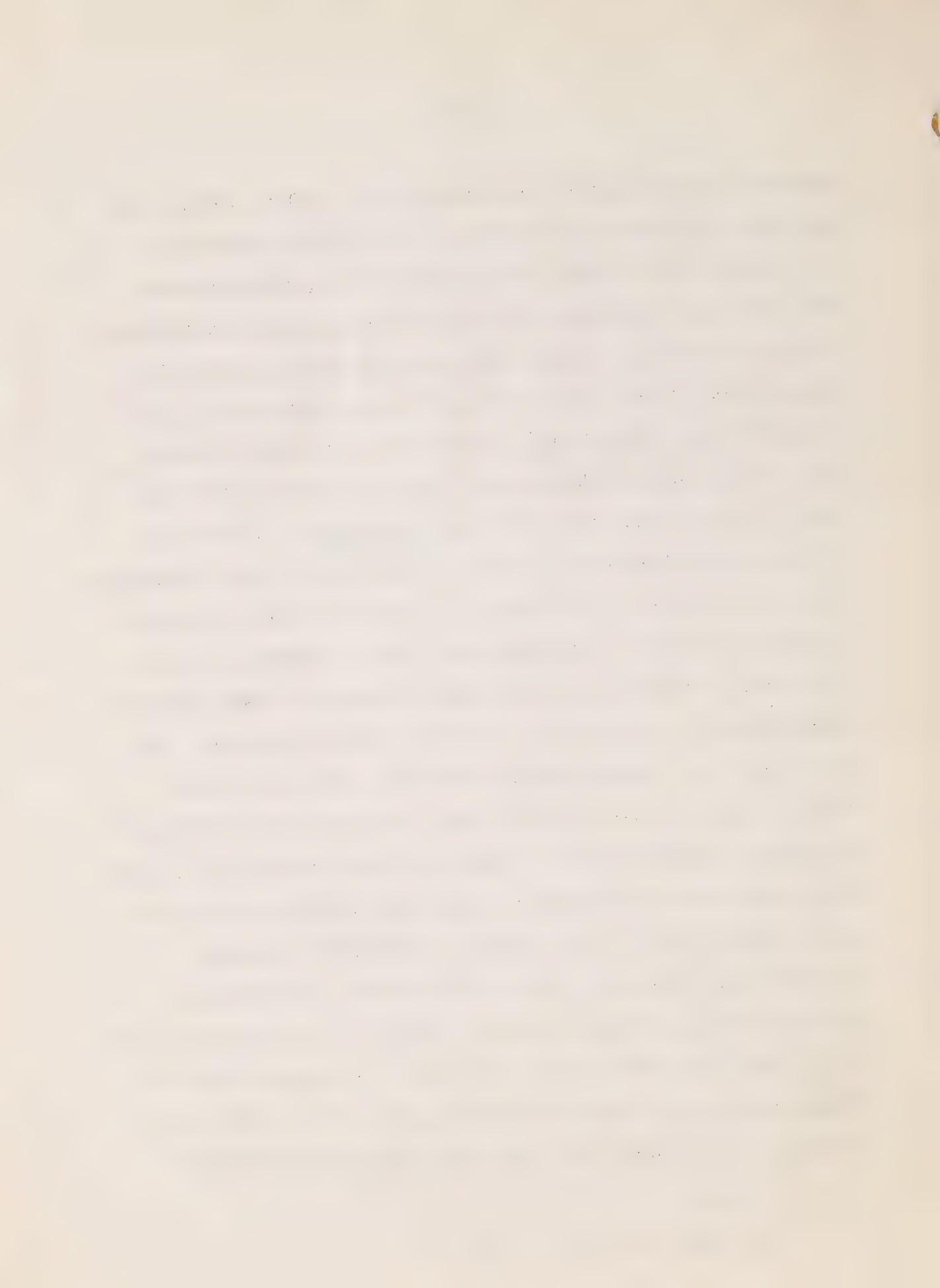
Ratios of Supreme Court Reversals of Provincial Court Decisions to Total Number of Cases in Different Types of Legal Issue



Supreme Court's reported decisions from 1950 to 1964.¹ In applying the various categories listed under question 11, as we noted above, some rather subjective judgments were involved. By bicultural issues, generally, we had in mind any subject-matter of a case which might at least potentially be regarded as one capable of producing a division of judicial attitudes along French vs English or possibly French-Catholic vs English-Protestant lines. The most prevalent type of bicultural issue was civil liberties. A total of 75 cases were deemed to involve a question of civil liberties; 63 of these came up in provincial appeals. Now, of course, in Canada without a Constitutional Bill of Rights, it is difficult to decide when the legal issues in a case impinge significantly on a person or group's civil liberties. The only test that can be applied here is a functional one: besides the few cases in which the court has dealt with the statutory Canadian Bill of Rights, we have counted as a civil liberties case any dispute in which are involved such classical liberterian social values, as freedom of speech, religion and assembly, freedom from racial or religious discrimination and the citizen's right to due process of law in his dealings with public officials. A complete list of these cases is provided in Appendix IV. As for other bicultural issues these are sub-classified into questions

¹

See Appendix III, Q. 11.



of family relationships, obscenity, morality, religious beliefs, educational matters and other issues which defy further classification. Again lists of cases involving each of these matters can be found in Appendix IV. It is important to note that the various sub-classifications of bicultural issues are not mutually exclusive. Consequently many of the cases which have been scored as ones involving a civil liberties question may involve one or more of the other bicultural issues. This happens to be particularly true of the bicultural issues in Quebec appeals, where, of the 12 "other bicultural issue" cases referred to in column 3 of Table 5, 9 were also considered to involve civil liberties questions, so that there is a considerable overlap among the Quebec appeals referred to in columns 2 and 3.

Looking more closely at the actual cases containing civil liberties or other bicultural issues in which the Supreme Court decision ran counter to that of the Quebec courts, we can see that they concerned what were probably the most explosive controversies before the Court since the abolition of Privy Council appeals. Taking both civil liberties and other bicultural issues together there were 10 Supreme Court reversals. Half of these were the major contests between Quebec authorities and the vigorously anti-Catholic Jehovah's Witness sect. These five cases, Boucher v. the King [1951] S.C.R. 265, Saumur v. City of Quebec [1953] 2 S.C.R. 299, Chaput v. Romain et al [1955] S.C.R. 834,

Roncarelli v. Duplessis [1959] S.C.R. 121 and Lamb v. Benoit [1959] S.C.R. 321, with the exception of the Chaput case, were also cases in which the French-Canadian judges on the Supreme Court were all on the dissenting side. Four of the other five cases also involved highly controversial issues. Two of these were in the area of constitutional law: Henry Birks & Sons (Montreal) Ltd. & others v. City of Montreal & A.-G. Que. [1955] S.C.R. 799 concerned the validity of Quebec legislation enabling municipalities to pass by-laws to close stores on religious holidays and Switzman v. Elbling & A.-G. Que. [1957] S.C.R. 285 concerned the validity of Quebec's so-called "Padlock Law". While the Supreme Court was unanimous in the Birks case, in the Padlock-Law case, Taschereau dissented alone. In two further cases, however, Brodie, Danksy and Rubin v. The Queen [1962] S.C.R. 681 which raised the question of whether Lady Chatterley's Lover was an obscene publication and Taillon v. Donaldson [1953] S.C.R. 257 which concerned the rights of natural parents over their children, the French-Canadian judges again dissented together. The tenth case, A.-G. Canada v. Readers Digest Association [1961] S.C.R. 775, although it involved an important question of constitutional jurisprudence concerning the admissibility of extrinsic evidence, was, in terms of the clash of social values, the least controversial of the ten and in it the Supreme Court was unanimous.



This brief analysis of the cases in this group suggests that there is a considerable overlap of the cases in which the Supreme Court has shown a marked tendency to reverse the Quebec courts of last resort and those cases in which the French-Canadian members of the Supreme Court have been outvoted by their English-Canadian colleagues. Further confirmation of this overlap will be provided by the analysis of the voting patterns of Supreme Court judges in bicultural issue cases presented later in this chapter. Thus we may find that our observations of the Supreme Court's treatment of Quebec appeals and of voting patterns among Supreme Court justices point to the conclusion that in those areas of the law raising civil liberties questions and the other bicultural issues we have designated, the Supreme Court's Anglo-Saxon majority has consistently defeated not only the Court's French-Canadian minority but also the judges who man the highest courts in Quebec. Still we cannot treat this finding as proof that in these cases it is the ethnic background of the judges which is the main determinant of the clash of judicial attitudes. At best, we take such evidence as providing stronger grounds for subscribing to such a view. But no amount of quantifying is likely to be thorough enough to isolate all the variables which may enter into the determination of a law-suit. Whatever inferences might be drawn from the statistical evidence presented here will be more carefully investigated in our

more "qualitative" study of the leading cases which is presented in the next chapter. Also we should bear in mind the point which we raised earlier in our discussion of bicultural concerns in Chapter 2 above¹: even if over a given category of legal issue there is a marked tendency for Quebec or French-Canadian judges to be pitted against English-Canadian judges, this division of judicial attitudes need not necessarily be taken to be co-terminous with the division of popular attitudes between the two major cultural groups. Indeed it may be that the important common social characteristic of those French-speaking, Quebec jurists who are defeated by the Supreme Court majority is not merely the fact that they are French or from Quebec but that they are from that segment of the Quebec legal profession which is most likely to receive judicial appointments controlled by the Quebec section of the federal cabinet.

The procedure we have followed in comparing the Supreme Court's disposition of Quebec appeals with its treatment of other provinces' appeals might be questioned on the grounds that in lumping the figures of all the provinces except Quebec together in a single set of aggregate figures we may have covered up some features of the Supreme Court's treatment of some other single province's appeals which are as distinctive as the aspect of Quebec appeals which we have

¹

See p. 142 above.

discussed above. However, on examination of the Supreme Court's disposition of appeals in bicultural issue and civil liberties cases on a province-by-province basis with one exception revealed a very uniform pattern outside of Quebec appeals. The one serious exception was with Manitoba, where in civil liberties cases and other bicultural issue cases the decisions of the Manitoba Court of Appeal were upset by the Supreme Court in three out of four and two out of two appeals respectively. The two "other bicultural issue cases" also raised civil liberties questions so that the total number of cases involved here is extremely small. Nevertheless it is still interesting to observe that in the three cases where the Supreme Court reversed the decisions of the Manitoba appeal court, the Supreme Court decision was on what might be called the "liberal" side of the case. All three cases were reported in 1964 and in all three the Supreme Court was unanimous. In Prince & Myron v. The Queen [1964] S.C.R. 81. The Court held that Indians hunting for their livelihood on unoccupied Crown land or land to which they had a right of access were not subject to the restrictions imposed on sportsmen by Manitoba's Game and Fisheries Act; in Dominion News & Gifts (1962) Ltd. v The Queen [1964] S.C.R. 251, with Chief Justice Taschereau writing the opinion of the Court, the Supreme Court found that issues

of "Escapade" and "Dude" magazines were not obscene; and in Winnipeg Film Society v Webster [1964] S.C.R. 280, the Court ruled that Section 6 (1) of the Lord's Day Act did not prevent the Film Society from showing films on Sundays. In the one civil liberties case in which the Supreme Court dismissed the Manitoba appeal, Orchard et al v Tunney [1957] S.C.R. 436, the Court again upheld the right of the individual, this time against a trade union accused of improperly suspending his union membership. Thus the Manitoba cases in this area, revealing as they do a conflict between what might be called a more 'liberal' Supreme Court and a less 'liberal' provincial court, should be kept in mind in interpreting the high frequency of Supreme Court reversals of Quebec appeal court decisions in civil liberties cases. It should at least make one cautious about giving ethnic explanations of that tendency.

There are several other comparisons in Table 6 which call for some comment. The difference between the disposition of Quebec appeals and the disposition of the other provinces' appeals in criminal cases would, on the surface, appear to be significant. Indeed the difference shown between the two entries in column 4 satisfies a test of significance at the 5% level. However, on closer examination this turns out to be an example of where the aggregation of appeals for all the provinces except Quebec is misleading. Taking the figures for the four provinces other

than Quebec that had ten or more criminal appeals during his period, two of them, British Columbia and Manitoba, had reversal ratios which were approximately as high as Quebec's ($\frac{14}{27}$ and $\frac{6}{11}$ respectively) whereas with two others, Ontario and Alberta, reversals of their criminal decisions were relatively few ($\frac{19}{45}$ and $\frac{3}{15}$ respectively). So the evidence here does not point to a unique relationship between the Supreme Court and Quebec courts in the criminal law area.

Turning now to the record of appeals in constitutional law there would seem to be some evidence for the view that here again the Supreme Court has demonstrated a marked tendency to upset the decisions of Quebec's appeal court. But the number of Quebec appeals in constitutional law cases¹ is extremely small, so that it would be rash to infer too much from the unusually high reversal rate Quebec decisions have experienced in this area.² It should be noted that three of the four Quebec reversals were the (1953) Saumur case, the Birks and the Padlock-Law case, all of which involved important civil liberties values. The fourth was Vic Restaurant Inc. v City of Montreal [1959] S.C.R. 58 which, while it found all three of the Quebec Supreme Court judges in dissent, did not

¹ By constitutional law cases here we included not just cases which were solely concerned with constitutional challenges to legislation as was the case in the classificatory scheme used for Table 3 above (see p. 284, footnote 1 above) but any case in which one of the issues raised was a question of the constitutional validity of legislation.

² The difference between Quebec's rate of 4 reversals out of 5 decisions and that for all the other provinces is significant at the 10% level.

raise an issue which fell into the same nEXIS as the Saumur, Birks and Switzman cases. The one constitutional case in which the Supreme Court denied the Quebec appeal was the most recent effort of the Jehovah's Witnesses to force the Supreme Court to decide the validity of Quebec legislation restricting that sect's freedom of communication. But in this case, Saumur et al v. Procureur Général de Québec et al [1964] S.C.R. 252, while the Supreme Court upheld the Quebec Court of Queen's Bench's judgment it did so not on the merits but on the procedural point of whether or not it was appropriate to hear an appeal on the merits.

But perhaps more significant than the quantitative comparison of the disposition of Quebec constitutional appeals with those from the rest of Canada is simply the small number and special nature of Quebec constitutional cases. During this fifteen year period there were 45 cases in which the constitutionality of legislation was questioned. 41 of these came to the Supreme Court by way of provincial appeals and 4 in federally-initiated reference cases. 34 of the 41 provincial appeal cases which raised constitutional questions presented challenges to the validity of provincial legislation. But outside of Quebec most of these constitutional cases involved tests of the validity of provincial initiatives in the field of taxation¹, commercial and

¹ C.P.R. v. A.-G. Sask. [1951] S.C.R. 190, Phillips & Taylor v. City of Sault Ste Marie [1964] S.C.R. 404, City of Toronto v. Olympia Edward Recreation Club Ltd. [1955] S.C.R. 454, Texada Mines Ltd. v. A.-G. B.C. [1960] S.C.R. 713 and Cairns Construction Ltd. v. Govt. of Sask. [1960] S.C.R. 619.

economic regulation¹ and transportation (including highways) policy.² It is also worth noting that ten of these cases were initiated by provincial governments referring constitutional questions to the courts. Quebec's record of constitutional litigation during these years is quite outside this general pattern. Not only were constitutional challenges rather few in number - 5 as compared with 8 each in Ontario and British Columbia and 6 each in Manitoba and Saskatchewan - but, with one exception, they were essentially concerned with provincial restrictions of vital communicative freedoms, and certainly none of these were initiated by the Quebec government's reference of the constitutional question to the courts.

In the area of constitutional law Quebec appeal cases to the Supreme Court suggest a relative lack of interest on the part of private individuals and groups in Quebec in

¹ A.-G. N.S. v A.-G. Can. [1951] S.C.R. 31, Western Minerals Ltd. et al v. Gaumont et al [1953] 1 S.C.R. 345, In Re The Moratorium Act (Sask.) [1956] S.C.R. 31, Ref. re the Farm Products Marketing Act (Ont.) [1957] S.C.R. 198, Dupont et al v. Inglis et al [1958] S.C.R. 535, A.-G. Ont. & Display Service Co. Ltd. v Victoria Medical Bldg. Ltd. [1960] S.C.R. 32, Smith v the Queen [1960] S.C.R. 726; Re Validity of Orderly Payment of Debts Act 1959 (Alta.) [1960] S.C.R. 571, Crawford et al v. A.-G. B.C. et al [1960] S.C.R. 346, Duplain v. Cameron et al & A.-G. Sask. [1961] S.C.R. 693 and A.-G. Ont. v. Barified Enterprises Ltd. [1963] S.C.R. 570.

² Winner v. S.M.T. Eastern Ltd. & A.-G. Can. [1951] S.C.R. 887, Johannesson et al v. West St. Paul [1952] 1 S.C.R. 292, Re Validity of S.92(4) Vehicle Act (Sask.) 1957 [1958] S.C.R. 608, O'Grady v Sparling [1960] S.C.R. 804, Stephens v the Queen [1960] S.C.R. 823.

pressing challenges to new provincial legislative programmes to the nation's highest tribunal as well as the lack of any inclination on the part of the Quebec provincial government to voluntarily turn to the Supreme Court for the resolution of constitutional controversies. Of the four constitutional appeals which did go before the Supreme Court to be decided on the merits, not only did three of them focus on the province's capacity to limit religious and communicative freedoms, but in all three, the Quebec Court of Queen's Bench was reversed and the provincial legislation was found to be either inoperative¹ or invalid.²

The record of the Supreme Court's treatment of constitutional challenges to provincial legislation further suggests that it has been more inclined to cut down Quebec legislation which might be regarded as curtailing civil liberties than to invalidate the more prosaic legislative ventures of the other provinces in such fields as business regulation, taxation and highways control. In only 10 of the 29 challenges to provincial legislation from provinces other than Quebec did the Supreme Court find provincial legislation invalid in whole or in part. We should bear in mind again with regard to this contrast that the small number of Quebec cases may make any generalizations based on this

¹As in the first Saumur case

²The Birks and Switzman cases.

quantitative evidence hazardous. Still, it may be, as we have already suggested, that the relative paucity of Quebec constitutional appeals to the Supreme Court is in itself indicative of rather different attitudes in that province to the merits of challenging provincial legislation up to the Supreme Court level.

There is one other aspect of this comparative study of the Supreme Court's treatment of provincial appeals which calls for some comment. The final two columns of Table 5 indicate the two areas in which the Supreme Court is relatively disinclined to reverse the decisions of Quebec courts. Only the difference shown in columns 7 on private law appeals, between the Supreme Court's disposition of Quebec appeals as compared with its disposition of the other provinces' appeals is significant at the 5% level. But this is the most crucial area in terms of bicultural concerns, for it is in the area of private law that most of the appeals involving Quebec's distinctive system of civil law would be found. Here it is interesting to observe that on a quantitative basis the Supreme Court has shown less willingness to upset the judgments of Quebec courts than the private law judgments of the other provincial courts. Still it should be noted that insofar as Ontario-Quebec differences are concerned, aggregation of the other provinces records is misleading, for Ontario's ratio of reversals to appeals in

private law cases is only slightly above that of Quebec. Taking those provinces which have produced more than five appeals in this field, the real contrast is between Quebec and Ontario on the one hand and the other six provinces on the other.

5. Voting Patterns

(i) Purpose

The purpose of this section of our quantitative analysis of Supreme Court decisions is to see if it is possible to identify any provincial or ethnic blocs at work in the Supreme Court's decision-making. By blocs we simply mean a group of judges who display an abnormally high tendency to vote together in certain categories of decisions which tend to divide the Court. If we are able to show that a group of judges with a common ethnic or provincial background tend to function as a bloc in some area of law which is thought to be vulnerable to a division of opinion along ethnic or provincial lines, we shall at least be able to add some further support for the hypothesis that the ethnic or provincial background of judges is a determinant of their decision-making in certain types of cases.

There are innumerable factors which might function as determinants of judicial decision-making. Any of these

factors, ranging from the differing legal philosophies and techniques of the judges to differences in their social and psychological characteristics might be capable of consistently dividing the members of the Court, in certain areas of their work, into blocs. However, in this study we have concentrated solely on common elements in the provincial and ethnic backgrounds of the judges as possible determinants of blocs. The reason for this is, of course, the terms of reference of this project.

Nevertheless there is certainly some danger involved in concentrating solely on these ethnic and provincial factors. The danger is that, if we do find discernible blocs of judges based on ethnic or provincial backgrounds, this might be taken as evidence for the view that it is simply the fact that the judges belong to a particular ethnic group or come from a certain province which causes them to take a particular side of a legal controversy. Such an inference would not, of course, be justified. As we pointed out in Chapter II, there are no a priori grounds for assuming that a judge from a particular ethnic group or province "represents" the values of that group or province. Such an assumption could only be correct if,
1) there was a consensus within the province or ethnic group on the particular value conflict involved in the legal controversy, and 2) if the judge agreed with that consensus. Because neither of these conditions might be met, we must go beyond the purely statistical identification of judicial blocs and look at the actual issues around which the blocs form with

a view to discerning whether the values which a particular bloc upholds could be held to represent the ethnic group or province with which the bloc is associated. Our qualitative analysis of some of the leading "bicultural issue" cases in the next chapter will be in part designed to serve this purpose.

Besides providing evidence for the existence of ethnic or provincial blocs, the quantitative study is also designed to cast some light on the power structure of the Court. We are interested not only in identifying the common denominators of the divisions of the Court's bench, but the relative power which different groups of judges have in determining controversial issues which come before the Court. Again this investigation of the distribution of power will focus on those cases which seem most sensitive to bicultural and federal concerns.

(ii) Method

The method employed in this study of the voting behavior of Supreme Court justices is derived from methods developed by Professor Glendon A. Schubert.¹ The tables used

¹ Schubert, in turn, derived much of his methodology from the earlier bloc-analysis of Prof. C. Herman Pritchett. Schubert has explained and illustrated techniques of bloc analysis in a number of publications: "The Study of Judicial Decision-Making As An Aspect of Political Behavior" LII American Political Science Review (1958) 1007, at pp. 1009-1014; Quantitative Analysis of Judicial Behavior, (Free Press, 1959) ch. III; Constitutional Politics (Holt, Rinehart & Winston, 1960) pp. 155-171.



by Schubert in his approach to bloc-analysis are designed to exhibit three different kinds of judicial coalescence. First, there is a table which is aimed at identifying dissenting blocs and records for every possible pair of judges the number of times they dissent together. Secondly, a table can be constructed which shows the participation of judges in the majority in the Court's split decisions by recording the number of times each pair of justices votes together in assent in split decisions. A third type of table can be constructed out of the data used for the first two tables which displays the over-all pattern of interagreement on the Court in split decisions. This table shows paired agreement of the judges in both assent and dissent, expressed as a percentage of total paired participation for each pair of judges.

Schubert in interpreting the data shown in these tables has evolved certain indices for testing whether the frequency with which the members of a postulated bloc are paired together is significantly high so that the members of the postulated bloc can in fact be held to belong to a bloc. These indices which we will refer to below in interpreting our own results are taken as measures of significance simply "(O)n the basis of limited empirical application."¹ While we have not been able to develop any alternative measures of significance, still we should be cautious about applying

¹Glendon A. Schubert, "The Study of Judicial Decision-Making as an Aspect of Political Behavior." Above, page 33, footnote 1, p. 1012.



Schubert's indices, which were developed in the context of the United States Supreme Court's decisions, to Canadian Supreme Court decisions.

There are a number of points of difference between the American and Canadian Courts which will affect the application of Schubert's scheme. The most important of these is that, unlike the United States Supreme Court where the entire membership of the court - all nine judges - sits for each case, the Canadian Supreme Court rarely sits en banc. For the Canadian Supreme Court, five judges constitutes a quorum, and for the bulk of its cases, only five judges sit.¹ This means that in measuring the extent to which particular pairs or groups of judges coalesce together, consideration must be given to the frequency with which the members of the group or bloc are present together for the cases under consideration.

A second point of contrast concerns the shape and size of the Canadian Supreme Courts work-load. As we have previously noted, the rules governing the Supreme Court of Canada's jurisdiction are such that unlike the United States Supreme Court, the Canadian Court exercises relatively little control over its own docket and spends much of its time settling rather mundane legal disputes which are not likely to raise large public issues or entail sharp and significant value conflicts.

¹ See above, chapter III, Table 1c, for a breakdown of the number of judges sitting for different types of cases.

When you add to this the fact that the Canadian Supreme Court for any given period is called upon to make fewer discrete decisions¹ than is its American counterpart, it becomes clear that the number of decisions any given composition of the Canadian Court makes in an area of law which is apt to divide the Court into discernible blocs will be much smaller than is the case with the United States Supreme Court.

One step we have taken to produce larger numbers of cases for bloc-analysis is to produce single tables for the entire period from 1954 to 1964, even though there were a number of changes in the Court's personnel during this period. We have accomplished this by bracketing together each member of the 1954 Court with the judge who replaced him. If the replacement was in turn subsequently replaced, as was the case with Justice Nolan who replaced Justice Estey and later was replaced by Justice Martland, we have bracketed all three judges together. The point to note about this procedure is that even though it may hide differences between the

¹In our bloc-analysis each case is taken to represent one decision of the Court. In cases where the Court settled more than one question, one issue has been selected as the decisive one in the case.

original judge and his replacement, this should not significantly affect the principal target of our analysis which is the analysis of the voting behavior of French-speaking Quebec justices as compared with that of English-speaking judges. In 1954 Justice Abbott replaced Chief Justice Rinfret and after that there were no further changes in the Quebec representation on the Court. This means that for the entire decade from 1954 to 1964, we are dealing with the same trio of Quebec judges. Thus our voting data is divided into two periods - the first is the period during which Chief Justice Rinfret, Justices Taschereau and Fauteux were the three Quebec judges and the second that during which Justices Abbott, Taschereau and Fauteux were the Quebec judges. By organizing our data this way, not only will we obtain larger numbers of cases for each table, but in so doing we shall still be able to observe precisely the extent to which the Quebec judges vote together and, indeed, gain an overall comparison of the degree of coalescence of the Quebec judges when all of them are French-speaking (i.e. The "Rinfret" Court) with that which obtains when one is English-speaking (i.e. the "Abbott" Courts).

(iii) Overall Voting-Patterns

Before examining the voting behavior of Supreme Court judges in certain specialized legal categories we shall look at an aggregate picture of the Court's divisions

in all areas of law. For this purpose we shall be concerned with all of the Court's split decisions in recorded judgments during the post-1949 period. For comparative purposes we shall, as we previously indicated, divide this period into two parts: the first table will record voting during the first four years when the Court's composition was unchanged and Chief Justice Rinfret was one of the three Quebec judges; the second table will cover the remaining years throughout which Justice Abbott was the third Quebec judge.

Tables 6a and 6b record the ratios of paired agreement for each pair of judges in the "Rinfret" and "Abbott" periods. For each pair of judges the ratio is formed by dividing the number of times the two judges were present for a case into the sum of their joint assents and dissents. Thus the figure recorded for each pair of judges indicates the proportion of times they have agreed with each other when they have both participated in divided decisions of the Courts. This type of interagreement table should draw our attention to any pair or group of judges which show a marked tendency to either agree or disagree with one another in the Court's controversial cases. Also, because the denominator of these ratios is the paired participation of the judges, as measures of interagreement these ratios will take into account the extent to which judges are not involved in the same cases - a factor which is particularly important for the Canadian Supreme Court which usually sits as a five-judge

	Rand	Kellock	Estey	Locke	Cartwright	Kerwin	Rinfret	Fauteux	Taschereau
Rand	81	62		52	66	48	42	45	39
Kellock	81		76	64	48	58	42	63	50
Estey	62	76		45	49	71	50	58	46
Locke	52	64	45		33	33	46	35	43
Cartwright	66	48	49	33		50	38	61	54
Kerwin	48	58	71	33	50		56	62	56
Rinfret	42	42	50	46	38	56		53	53
Fauteux	45	63	58	35	61	62	53		81
Taschereau	39	50	46	43	54	56	53	81	

97 cases

Ratios of Interagreement in Split Decisions of the "Rinfret"
Court, 1950-1954,

Table 6a

	Cartwright	Locke-Hall	Rand-Ritchie	Kerwin-Spence	Estey-Nolan-Martland	Kellock-Judson	Abbott	Fauteux	Taschereau
Cartwright	47	53	37	47	29	28	30	27	
Locke-Hall	47	45	51	54	40	34	49	48	
Rand-Ritchie	53	45	51	73	68	49	53	52	
Kerwin-Spence	37	51	51	61	64	72	60	59	
Estey-Nolan-Martland	47	54	73	61	57	69	63	54	
Kellock-Judson	29	40	68	64	57	77	67	58	
Abbott	28	34	49	72	69	77	70	71	
Fauteux	30	49	53	60	63	67	70	83	
Taschereau	27	48	52	59	54	58	71	83	

213 cases

Ratios of Interagreement in Split Decisions of the "Abbott"

Courts, 1954-1964

Table 6b

court.

The first point to make about these two tables is a negative one: when we look at the pattern of interagreement throughout all of the Supreme Court's divided decisions, we find no strong evidence pointing to the existence of provincial or ethnic blocs. In both parts of the post-1949 period, it is true that Fauteux and Taschereau displayed an extraordinarily high rate of agreement - over 80% in both the "Rinfret" and "Abbott" periods. Schubert in his work employed an Index of Interagreement which was simply the average of the ratios of the pairs included in a postulated bloc. He considered (on empirical grounds) that an Index of Inter-agreement of over .70 was high.¹ If we took Schubert's test then as a measure of significance, we could certainly look upon Fauteux and Taschereau as displaying a significantly high degree of accord. However, it is interesting that neither of the other two Quebec judges, Chief Justice Rinfret or Justice Abbott, showed this degree of cohesion with his provincial colleagues. It is perhaps even more interesting and surprizing (to those who too readily subscribe to ethnic determinism) that the English-speaking Quebec justice, Abbott, demonstrated a considerably higher propensity to agree with his French-Canadian

¹ See above, page 311, footnote 1, p. 1013.

colleagues than did the French-speaking judge, Rinfret.

We have tried in each table to establish a sequence of judges which seems best designed to reveal blocs of judges.¹ For the first period, Table 6a points to two possible blocs. Justices Rand, Estey and Kellock, three English-speaking judges normally considered rather liberal in their basic outlook have an Index of Interagreement of .73 which is quite high. But as these three judges came from New Brunswick, Saskatchewan and Ontario respectively, they could not be described as either a provincial or even a regional bloc. Moreover, when we note that the other three non-Quebec judges, Justices Locke, Cartwright and Kerwin agreed with their French-speaking colleagues in about the same proportion of cases as with their other English-speaking judges, we should become ~~very~~ wary of referring to the Rand-Kellock-Estey trio as an ethnic bloc. In the opposite corner of Table 6a, the three Quebec judges are grouped. But when we add Chief Justice Rinfret's ratios

¹

In ordering the judges we have tried in all the tables to place each judge closest to the judges with whom he is in most agreement and farthest from those with whom he agrees the least. For this purpose we have followed the Matrix Construction method recommended by Glendon Schubert in Quantitative Analysis of Judicial Behavior, above, page 310, note 1, pp. 83-4. Often this principle of arrangement cannot be completely fulfilled which, of course, indicates an absence of underlying relationships among the judges.

of agreement with his fellow Quebecers to Justice Fauteux's and Justice Taschereau's, we arrive at the rather moderate Index of Interagreement of .62. Again this hardly seems high enough to justify our attributing to this group the characteristics of an ethnic or provincial bloc. This view seems to be all the more justified when we observe, for instance, that Fauteux's average ratio of agreement with Kellock, Cartwright and Kerwin was also .62.

In the second part of the post-1949 period, however, with Abbott taking Rinfret's place on the Supreme Court bench, the three Quebec judges formed a more cohesive bloc. Their Index of Interagreement was .75. However, the significance of this diminishes somewhat when we observe the generally high ratios of agreement which obtained between all the Court's judges during this period, with the exception of Justice Cartwright and the Locke-Hall combination. When we average the ratios of agreement for all the pairs of judges exclusive of those involving either Justice Cartwright or Justices Locke and Hall, we find that the Index of Interagreement for the seven judges in this grouping is .63. What emerges from this table far more sharply than the contours of any blocs is the relative isolation experienced by Justice Cartwright and the Locke-Hall combination during these years. This is particularly marked in the case of Justice Cartwright whose

average rate of concurrence with his colleagues in split decisions was 37%. He disagreed with each of his colleagues on more than half of the occasions he participated in a divided decision with each colleague.

Summing up the results of these two tables we can say that the voting patterns through the whole variety of the Court's work over the past 15 years do not point to a division of the Court along essentially bicultural lines.

It is true that the two French-speaking judges who were members of the Court throughout the entire period have agreed with each other more than they have agreed with any other judges. But, on the other hand, the figures do not point to a consistent division of the Court along ethnic or provincial lines. Aside from the Rand-Kellock-Estey alliance on the "Rinfret" court and the isolation of Justice Cartwright and Locke-Hall throughout the "Abbott" Courts, the non-Quebec judges would appear to have had about as much in common with the Quebec judges as with each other. We have not bothered here to show paired dissent or assent in all of the Court's split decisions, but we can report that our inspection of these tables did not reveal any more substantial trends than the Interagreement Tables. We must now go on to examine voting in more specialized legal fields where there is a greater likelihood of encountering more sharply defined blocs based on real relationships among the judges.

(iv) Voting in Civil Liberties and Bicultural Issue Cases

In this section we shall apply three kinds of bloc-analysis to the Supreme Court's divided decisions in cases involving civil liberties questions or bicultural issues.¹ Again we shall divide the data for the post-1949 period into two time divisions and bracket the non-Quebec judges together as we did in subsection (iii) above. In addition to the interagreement tables which show paired agreement in assent and dissent as a percentage of paired participation, we shall use two other tables: one to record for each pair of judges, the member of times they dissent together and the other to record the number of times they agree in assent. The tables presenting paired agreement are designed to reveal dissenting blocs; the tables presenting paired agreement in assent aim at revealing the extent to which any group of judges combine together to form a majority bloc.

In Tables 7a to 7f we have applied these methods of bloc-analysis to the civil liberties and bicultural issue cases during the first part of the period, for the so-called "Rinfret" court. We have first in Tables 7a and 7b looked for dissenting blocs in civil liberties cases and bicultural issues cases respectively. It must be noted that since bicultural issues include civil liberties questions, the second table, in effect, includes the first but includes in

¹ For an explanation of the procedures followed in selecting these cases see above, pages 294, 296-7.

addition, the judges' voting in those divided decisions which touched on issues of family relations, morality, obscenity, religion or education.

Admittedly we are dealing with a small number of cases in these tables. Nevertheless, a very clear pattern of dissent is revealed: the three Quebec judges, with Cartwright as a close ally were clearly a dissenting bloc during this period. Schubert in measuring the cohesiveness of postulated dissenting blocs worked out an Index of Cohesion which is the ratio of the average number of times the members of a postulated bloc are paired together in dissent divided by the average number of times they have each dissented (i.e. the bracketed figure on the diagonal)¹. Schubert considered an Index of Cohesion of .50 or greater to be high. Applying this Index to Tables 7a and 7b, we find in the first instance, for civil liberties cases, the Quebec judges as a bloc have an Index of Cohesion of .77 and if Cartwright is added, the Index is lowered to .67. When we add the three bicultural issue cases in Table 7b, the Index for the Quebec bloc is .67 and for the three Quebec judges plus Justice Cartwright, it is .59.

Tables 7c and 7d record paired assent for the same cases as those upon which Tables 7a and 7b are based. When we look at these tables there does not appear to be as clear

¹ Above, page 311, footnote 1, pp. 1011-12.

an indication of a dominant majority bloc as there was of a dissenting bloc. Although negatively, one aspect of the Court's power structure which these tables do demonstrate is the very little influence which the three Quebec judges have had in determining the outcome of these cases. Schubert's test for the presence of a dominant majority bloc is an Index of Adhesion which is defined as the ratio of the average number of times the members of a postulated bloc are paired together in assent divided by the total number of split decisions under investigation.¹ Schubert considered an Index of Adhesion of .60 or more to be high. In Table 7c the quartet of Justices Rand, Kerwin, Kellock and Estey, with an Index of Adhesion of exactly .60, just meets this test. When the three other bicultural issue cases are added in Table 7d, the Index of Adhesion for this possible bloc falls to .56. Still, for what would seem to be the core of this bloc - Justices Kerwin, Kellock and Estey - the Index of Adhesion is .64.²

In Tables 7e and 7f, the data concerning paired assent and paired dissent from the previous tables are

¹ Above, page 311, footnote 1 , p. 1012.

² Of course, when we bear in mind that on the Canadian Court judges are more often absent from the Court for particular decisions, Schubert's test should be modified, so that these figures might be regarded as rather high.

	Kerwin	Estey	Rand	Kellock	Locke	Cartwright	Rinfret	Fauteux	Taschereau
Kerwin	0	0	0	0	0	0	0	0	0
Estey	0	(1)	0	0	0	0	0	0	0
Rand	0	0	0	0	0	0	0	0	0
Kellock	0	0	0	(1)	0	0	0	1	1
Locke	0	0	0	0	(2)	0	1	0	0
Cartwright	0	0	0	0	0	(4)	2	2	2
Rinfret	0	0	0	0	1	2	(3)	2	2
Fauteux	0	0	0	1	1	2	2	(3)	3
Taschereau	1	0	0	1	1	2	2	3	(3)

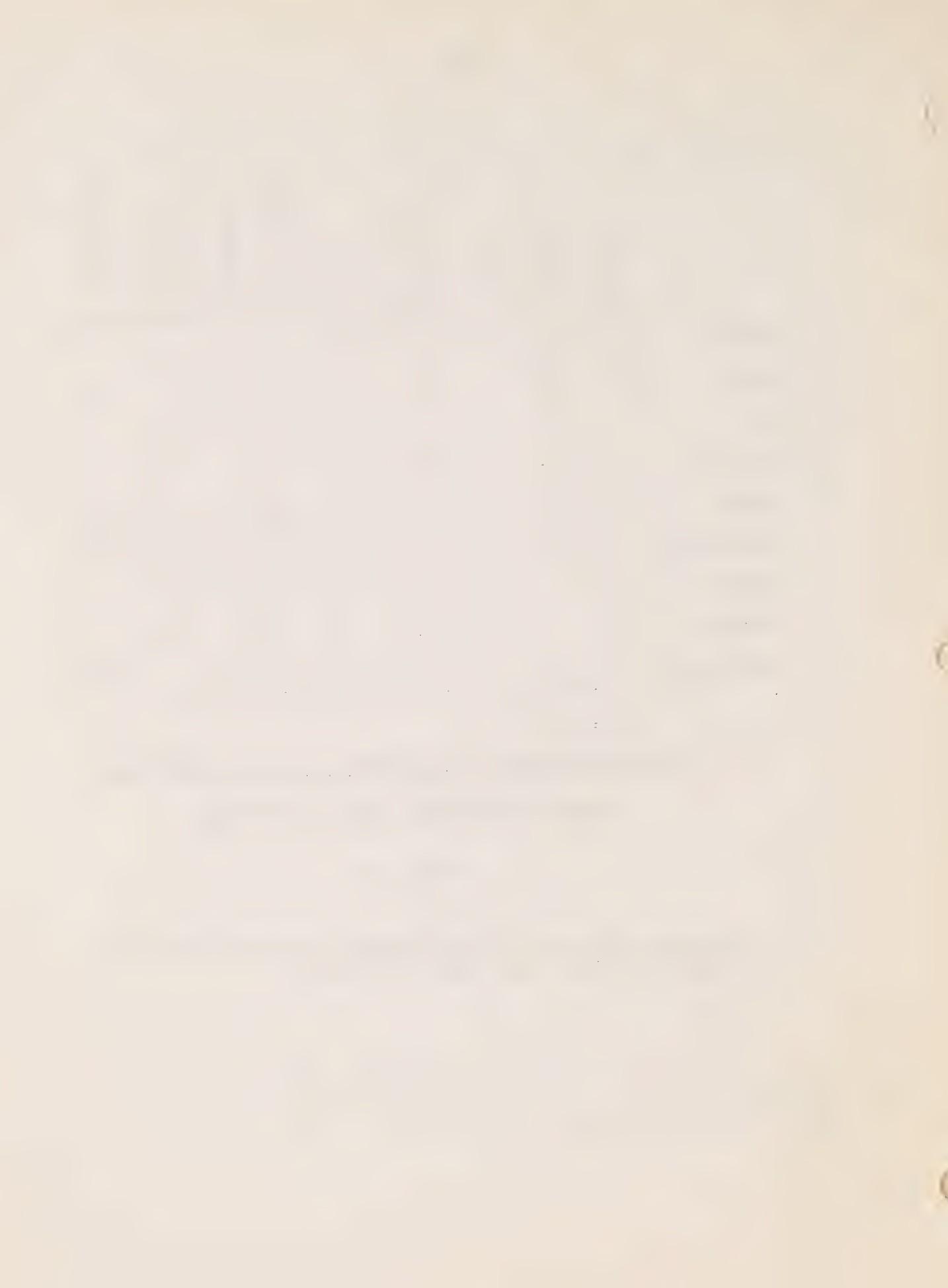
8 cases

Paired Agreement in Dissent in Civil Liberties

Cases, "Rinfret" Court, 1950-1954

Table 7a

* Bracketed figures on the diagonal indicate the total number of times the judge dissented.



	Kerwin	Estey	Rand	Kellock	Locke	Cartwright	Rinfret	Fauteux	Taschereau
Kerwin	(1)	-	-	-	-	1	1	-	-
Estey	-	(1)	-	-	-	-	-	-	-
Rand	-	-	(1)	-	-	-	-	-	-
Kellock	-	-	-	(1)	-	-	-	1	1
Locke	-	-	-	-	(2)	-	1	-	-
Cartwright	1	-	-	-	-	(5)	3	2	2
Rinfret	1	-	-	-	1	3	(4)	2	2
Fauteux	-	-	-	1	-	2	2	(4)	4
Taschereau	-	-	-	1	-	2	2	4	(4)

11 cases

Paired Agreement in Dissent in Civil Liberties

& Bicultural Issue Cases, "Rinfret" Court,

1950-1954.

Table 7b

	Cartwright	Locke	Rand	Kerwin	Kellock	Estey	Taschereau	Fauteux	Rinfret
Cartwright	(3)	2	2	3	1	3	-	-	-
Locke	2	(5)	3	4	2	4	-	1	1
Rand	2	3	(5)	5	4	4	1	1	-
Kerwin	3	4	5	(7)	5	6	2	1	-
Kellock	1	2	4	5	(5)	5	2	1	-
Estey	2	4	4	6	5	(7)	2	2	1
Taschereau	-	-	1	2	2	2	(2)	1	-
Fauteux	-	1	1	1	1	2	1	(2)	1
Rinfret	-	1	-	-	-	1	-	1	(1)

8 cases

Paired Agreement in Assent in Split Decisions in
Civil Liberties Cases, "Rinfret" Court, 1950-1954

Table 7c

* Bracketed figures on the diagonal indicate total number of times the judge assented.



	Cartwright	Locke	Rand	Kerwin	Kellock	Estey	Taschereau	Fauteux	Rinfret
Cartwright	(4)	2	2	3	2	3	-	-	-
Locke	2	(7)	4	5	4	6	1	1	1
Rand	2	4	(6)	5	5	5	1	1	-
Kerwin	3	5	5	(8)	6	7	2	1	-
Kellock	2	4	5	6	(8)	8	2	1	-
Estey	3	6	5	7	8	(10)	2	2	1
Taschereau	1	-	1	2	2	2	(2)	1	-
Fauteux	1	1	1	1	1	2	1	(2)	1
Rinfret	1	1	-	-	-	1	-	1	(1)

11 cases

Paired Agreement in Assent in Split Decisions in
Civil Liberties & Bicultural Issue Cases,
"Rinfret Court", 1950-1954.

Table 7d



	Cartwright	Locke	Rand	Kerwin	Kellock	Estey	Taschereau	Fauteux	Rinfret
Cartwright	33	50	50	20	28	50	50	50	50
Locke	33	60	67	40	57	0	20	50	
Rand	50	60	100	100	80	33	33	0	
Kerwin	50	67	100	83	86	40	25	0	
Kellock	20	40	100	83	83	60	50	0	
Estey	28	57	80	86	83	40	40	25	
Taschereau	50	0	33	40	60	40	100	100	
Fauteux	50	20	33	25	50	40	100	100	
Rinfret	50	50	0	0	0	25	100	100	

8 cases

Ratios of Interagreement in Split Decisions in Civil Liberties Cases, "Rinfret Court", 1950-1954.

Table 7e



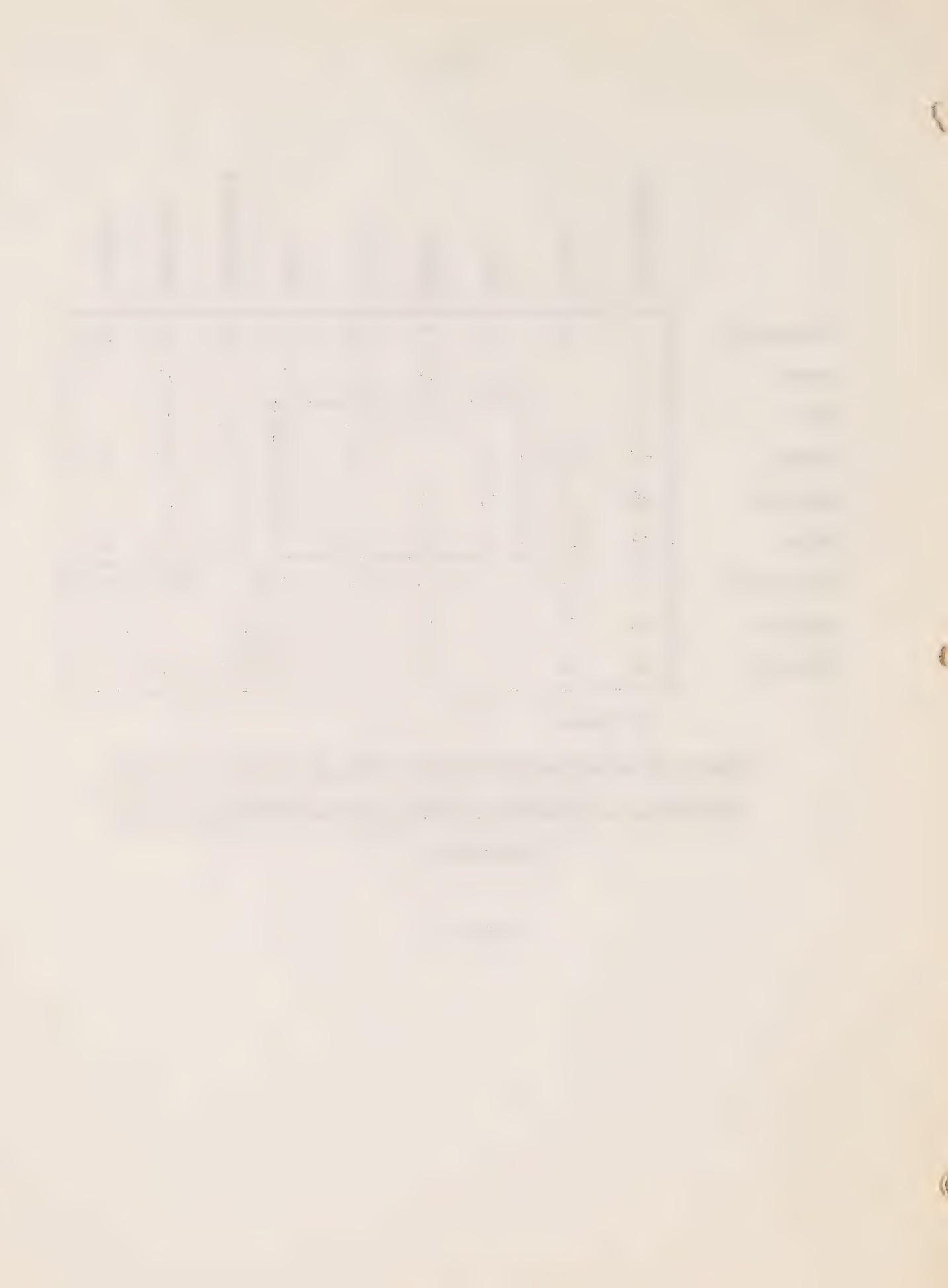
	Cartwright	Locke	Rand	Kerwin	Kellock	Estey	Taschereau	Fauteux	Rinfret
Cartwright	29	40	57	29	33	40	40	40	60
Locke	29		57	63	57	67	0	20	40
Rand	40	57		71	83	71	33	33	0
Kerwin	57	63		71		75	40	25	25
Kellock	29	57		83	75		50	40	0
Estey	33	67		71	78	89		33	20
Taschereau	40	0		33	40	50	33	100	100
Fauteux	40	20		33	25	40	33	100	100
Rinfret	60	40		0	25	0	20	100	100

11 cases

Ratios of Interagreement in Split Decisions in Civil Liberties & Bicultural Issue Cases, "Rinfret" Court,

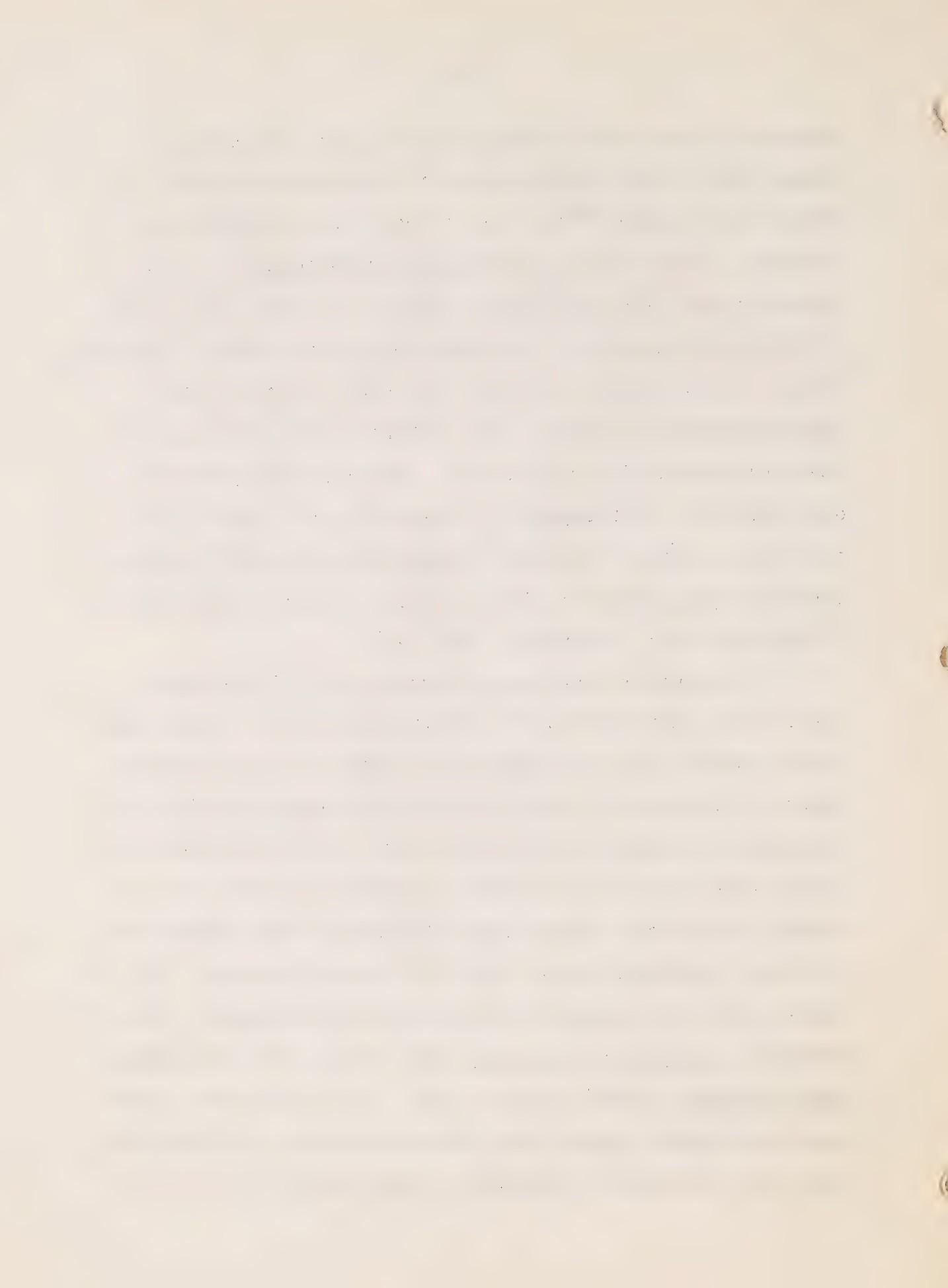
1950-1954.

Table 7f



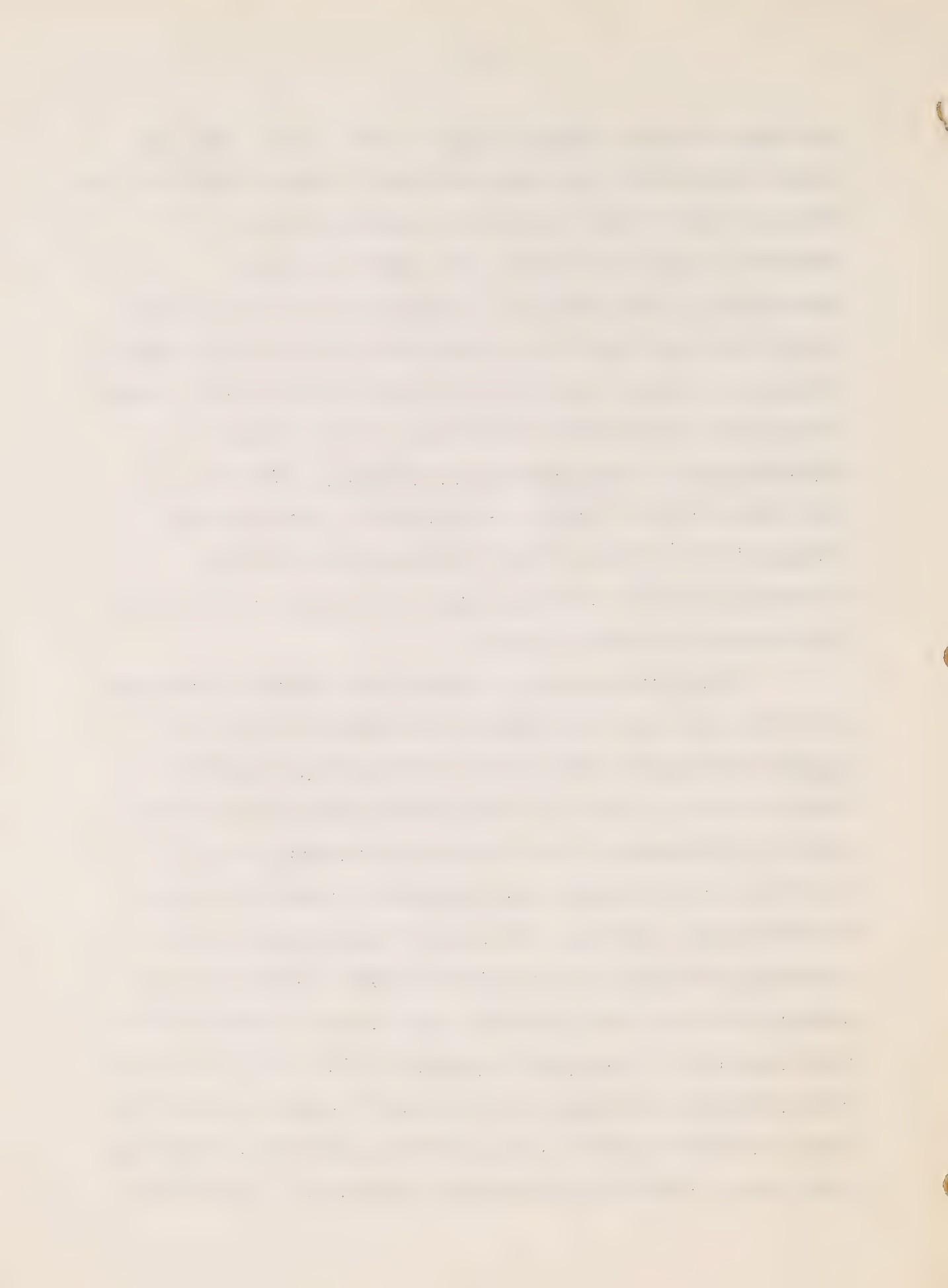
combined in the form of ratios showing for each pair of judges their joint participation in the decisions under consideration divided into the sum of their joint assents and dissents. These tables confirm the functioning in civil liberties and bicultural issue cases of two main alliances a winning coalition of four English-speaking judges - Justices Rand, Kerwin, Kellock and Estey and the losing trio of French-speaking justices. The members of the latter group never disagreed with one another. The majority group who demonstrated a high degree of cohesion in the civil liberties cases with an Index of Interagreement of .89; in civil liberties plus other bicultural issues, their average ratio of agreement was a slightly lower .78.

Although we shall be analyzing some of the cases involved in these tables in considerable detail in the next chapter with a view to examining the kind of value conflict which is involved in these divisions, it might also be worthwhile here to sketch in the character of the cases upon which these tables are based in order to obtain some idea of the issues around which these blocs of Supreme Court judges seem to form. Looking first at the civil liberties cases, two of these were very prominent controversies involving the Jehovah's Witnesses, Boucher v. The King [1951] S.C.R. 265 and Saumur v City of Quebec [1953] 2 S.C.R. 299. In both of these cases, the three Quebec judges were joined in dissent by Cartwright. The other dissents by the Quebec judges came in two cases:



the first of these, McKee v McKee [1950] S.C.R. 700 concerned the custody of a child and here Justices Taschereau and Fauteux, lead in their dissent by Justice Kellock, attached a higher priority to the apparent moral superiority of the father as a parent than to the circumstance that the father had jumped from California to Ontario in order to escape the ruling of the American court to whose jurisdiction he had first submitted; in the second, Williams et al v. Aristocratic Restaurants [1951] S.C.R. 762, Chief Justice Rinfret, supported by Justice Locke disagreed with the majority's finding that side-walk picketing in front of an employer's restaurant was a permissible exercise of free speech.

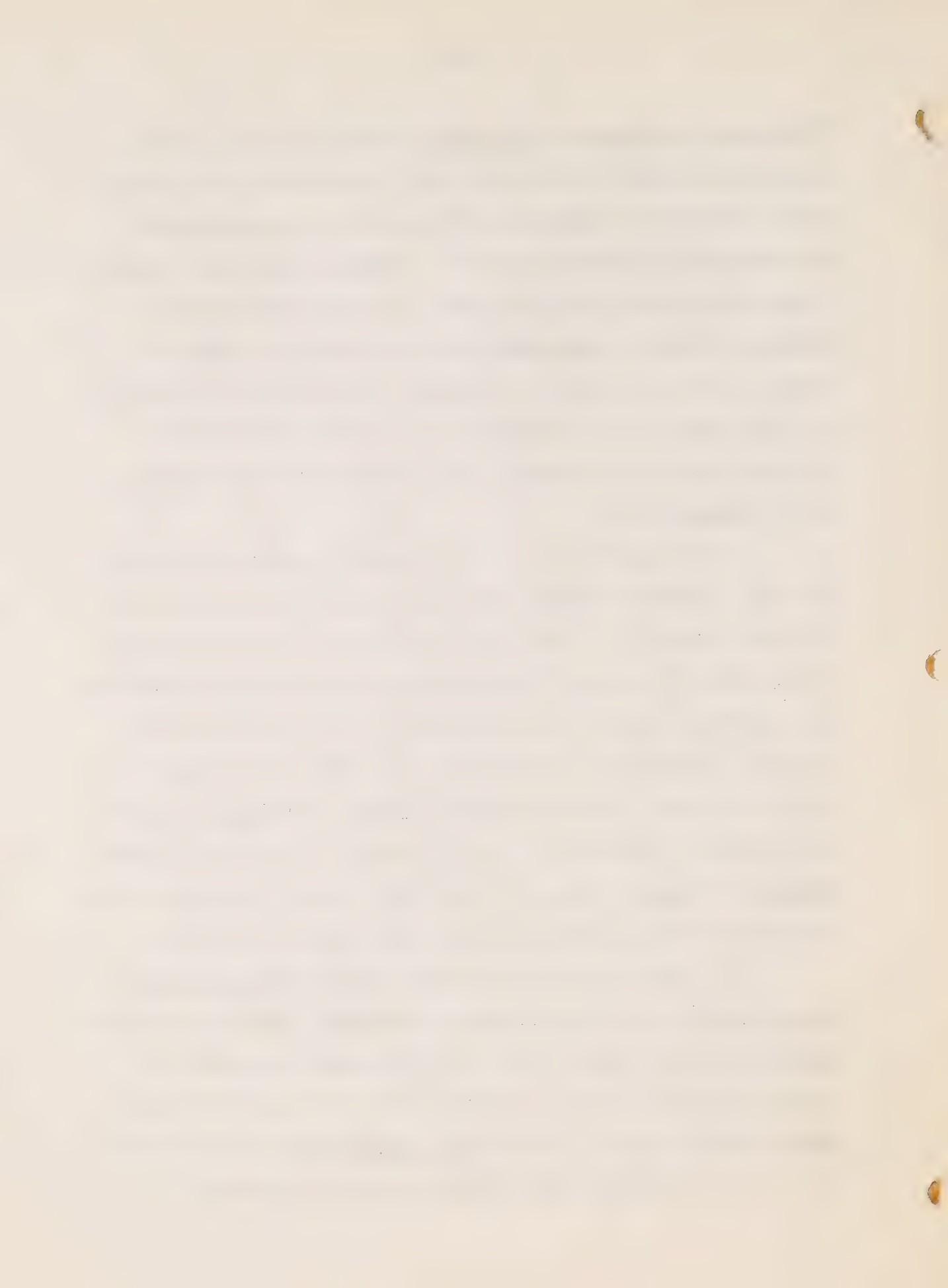
It is interesting to observe that Justice Cartwright who sided with his three Quebec colleagues in both the Boucher and Saumer cases in their dissenting defence of state actions to curb the proselytizing activities of the Jehovah's Witnesses, in his other two dissents, both of which were solo dissents, was opposed by a majority which included Quebec justices. In both of these cases Justice Cartwright defended an individual's rights against what he deemed to be the use of improper procedures by law-enforcement agencies. In Wright v. Wright [1951] S.C.R. 728 he was concerned with upholding an individual's right to be served with a notice of motion and supporting affidavits declaring him insane, before being committed as mentally incompetent.



Then again in Brusch v. The Queen [1953] 1.S.C.R. 373 he based his dissent on the view that a person who is charged with a particular criminal offence and in the subsequent proceedings is further accused of being an habitual criminal ought to be given an opportunity to decide whether the habitual criminal ~~charge~~ should be tried by a judge or jury. Justice Taschereau concurred with Justice Kellock's majority opinion in the Wright case, while Chief Justice Rinfret and Justice Fauteux were members of the majority in the Brusch case.

Cartwright's series of dissents in this early group of civil liberties cases indicates that it would be erroneous to describe the distribution of power on the Court as being that of a liberal English-speaking majority opposed by an illiberal French-speaking minority. Not only is there Justice Cartwright's switch from what might be thought of as the illiberal position in the Boucher and Saumur cases to the liberal, rights-of-the-individual, position, in the Wright and Brusch cases, but the other side of that behavior is the converse fluctuation of the majority's position.

The other two cases in this group, Noble and Wolfe v. Alley [1951] S.C.R. 64 and Rex v. Murakimi [1951] S.C.R. 801 provide further support for the view that the issues and value-conflicts involved in these cases do not turn on a simple bipolar axis. In the Noble and Wolfe case the Court in a 6-to-1 division, with Justice Locke dissenting



and Justice Taschereau concurring with the majority, released a purchaser of land from a clause in the Deed which prohibited the transfer of the land to any person of the Jewish, Hebrew, Semitic or Negro race or blood. The other case, Rex v. Murakimi, did not involve any of the Quebec judges. On this occasion, Justice Cartwright was joined by three other judges, with Justice Estey dissenting, in upholding a trial judge's acquittal of a person charged with unlawfully using instruments to procure a miscarriage, on the grounds that his statement to the police had not been given voluntarily.

Only two of the bicultural issue cases which were added to the civil liberties cases in Tables 7b, 7d and 7f involved Quebec judges. One of these, Taillon v. Donaldson [1953] S.C.R. 257, provided one of the best known examples of a common law majority defeating a civilian minority on a question concerning the application of Quebec's Civil Code. Justices Taschereau and Fauteux in dissent unsuccessfully tried to establish the rights of natural parents to the custody of their children, but were defeated by Justices Cartwright, Kellock and Estey. The other case, The King v. The Assessors of the Town of Sunnybrae Ltd., [1952] 2 S.C.R. 76 touched religious rather than ethnic interests. It concerned the question of whether the facilities operated by a Roman Catholic girls school as a laundry business were exempt from local assessment for property taxes. Chief Justice Rinfret supported by fellow-Catholic, Justice



Kerwin and Protestant Justice Cartwright, would have upheld the school's claim for exemption, but were defeated by a four-judge Protestant majority. The third case in this group, Schava Tzedek v. The Royal Trust Co. [1953] 1 S.C.R. 31, concerned a dispute over the proper size of the fee charged for a Jewish funeral. In this case Rand alone dissented from a wholly Anglo-Saxon majority's judgment that a "fair and reasonable" fee was all that the synagogue could demand.

In the next set of Tables, 7g to 71, we have applied the same types of bloc analysis to the Supreme Court's split decisions in cases involving civil liberties questions and bicultural issues for the years following Rinfret's departure from the Court until the end of 1964. Once again, as with our analysis of the Court's over-all decision-making during these years, we have constructed nine-judge tables for this ten-year period by aggregating the voting records of judges who left the Court during these years with the voting of their replacements.

An inspection of Tables 7g to 71 reveals that the bloc-behavior which was fairly distinct on the "Rinfret" Court in this type of case, is much less sharply defined on the "Abbott" Courts. Of course, the failure of any clear voting-pattern to emerge among the non-Quebec judges may be primarily the result of aggregating the voting records of several judges together. However, it is more significant that in this group of cases, contrary to the general trend,



with Justice Abbott replacing Chief Justice Rinfret, the three Quebec judges functioned much less as a cohesive bloc than they did on the "Rinfret" Court.

Looking first at the Dissent Tables, we can observe some tendency for the dissents to be clustered in the bottom right-hand corner of the Tables where the pairings of Quebec judges are recorded. But this tendency is much less marked than it was in the earlier period. The Indices of Cohesion for the Quebec trio for civil liberties and civil liberties plus other bicultural issues are considerably lower, at .60 and .57 respectively. Also Justice Cartwright's pattern of dissents would appear to have undergone a change in this latter period. His dissenting behavior no longer shows any distinctive association with the Quebec judges, as both the combination of Justices Locke and Hall and Justices Kellock and Judson joined the Quebec judges as often in dissent as did Justice Cartwright.

When we turn next to the two Assent Tables, 7i and 7j, there seems to be even less evidence of anything that might be called a dominant majority bloc. No pair or more of judges has an Index of Adhesion even as high as .50. There is one negative point which these tables do reveal: that is again, the relatively low level of participation of the two French-speaking judges in Court's majority in this set of decisions. The number of joint assents for both Justice Fauteux and Justice Taschereau steadily declines as we look



	Cartwright	Locke-Hall	Kerwin-Spence	Estey-Nolan-Martland	Rand-Ritchie	Kellock-Judson	Abbott	Fauteux	Taschereau
Cartwright	(7) 1	-	-	1	1	1	1	1	1
Locke-Hall	1 (4)	2	-	-	-	-	1	2	
Kerwin-Spence	-	2 (3)	1	-	-	-	1	1	
Estey-Nolan-Martland	-	-	1 (1)	-	-	-	-	-	-
Rand-Ritchie	1	-	1	- (2)	-	-	-	-	-
Kellock-Judson	1	-	-	- -	(3)	2	1	1	
Abbott	1	-	-	- -	2	(4)	3	2	
Fauteux	1	1	1	- -	1	3	(5)	4	
Taschereau	1	2	1	- -	1	2	4	(6)	

17 cases

Paired Agreement in Dissent in Civil Liberties

Cases, "Abbott" Courts, 1954-1964.

Table 7g



	Cartwright	Locke-Hall	Kerwin-Spence	Estey-Nolan-Martland	Rand-Ritchie	Kellock-Judson	Abbott	Fauteux	Taschereau
Cartwright	(8)	1	1	-	1	1	1	1	1
Locke-Hall	1	(7)	4	-	-	1	1	1	2
Kerwin-Spence	1	4	(6)	1	-	-	1	1	1
Estey-Nolan Martland	-	-	1	(2)	1	-	-	-	-
Rand-Ritchie	1	1	1	1	(5)	2	-	-	-
Kellock-Judson	1	1	1	-	2	(5)	2	1	1
Abbott	1	1	1	-	-	2	(5)	3	2
Fauteux	1	1	1	-	-	1	3	(5)	4
Taschereau	1	2	1	-	-	1	2	4	(6)

24 cases

Paired Agreement in Dissent in Civil Liberties

& Bicultural Issue Cases, "Abbott" Courts,

1954-1964

Table 7h



	Cartwright	Kerwin-Spence	Estey-Nolan-Martland	Locke-Hall	Kellock-Judson	Rand-Ritchie	Abbott	Fautoux	Taschereau
Cartwright	(9)	6	5	6	3	8	5	2	1
Kerwin-Spence	6	(8)	6	7	4	7	5	2	1
Estey-Nolan-Martland	5	6	(8)	5	5	8	5	3	2
Locke-Hall	6	7	5	(11)	5	7	6	3	4
Kellock-Judson	3	4	5	5	(7)	6	6	2	2
Rand-Ritchie	8	7	8	7	6	(13)	8	5	4
Abbott	5	5	5	6	6	8	(11)	4	5
Fautoux	2	2	3	3	2	5	4	(6)	5
Taschereau	1	1	2	4	2	4	5	5	(7)

17 cases

Paired Agreement in Assent in Split Decisions in Civil Liberties Cases, "Abbott" Courts, 1954-1964

Table 7i

Kerwin-Spence	Kellock-Judson	Estey-Nolan-Martland	Locke-Hall	Cartwright	Rand-Ritchie	Abbott	Fauteux	Taschereau
Kerwin-Spence	(9)	4	6	8	7	7	5	1
Kellock-Judson	4	(10)	6	6	5	7	3	3
Estey-Nolan-Martland	6	6	(11)	6	7	10	6	2
Locke-Hall	8	6	6	(14)	9	7	4	5
Cartwright	7	5	7	9	(15)	10	4	3
Rand-Ritchie	7	7	10	7	10	(16)	9	5
Abbott	5	7	6	6	7	9	(13)	5
Fauteux	2	3	3	4	4	6	4	7
Taschereau	1	3	2	5	3	5	5	(9)

24 cases

Paired Agreement in Assent in Split Decisions in Civil Liberties & Bicultural Issue Cases, "Abbott" Courts, 1954-1964

Table 7j

	Cartwright	Locke-Hall	Kerwin-Spence	Estey-Nolan-Martland	Rand-Ritchie	Kellock-Judson	Abbott	Fauteux	Taschereau
Cartwright	50	60	63	60	40	40	30	17	
Locke-Hall	50	82	63	54	56	46	44	55	
Kerwin-Spence	60	82		88	70	57	56	58	22
Estey-Nolan-Martland	63	63	88		100	71	63	38	22
Rand-Ritchie	60	54	70	100		67	57	50	36
Kellock-Judson	40	56	57	71	67		89	43	38
Abbott	40	46	56	63	57	89		70	58
Fauteux	30	44	38	38	50	43	70		90
Taschereau	17	55	22	22	36	38	58	90	

17 cases

Ratios of Interagreement in Split Decisions in Civil Liberties Cases, "Abbott" Courts, 1954-1964

Table 7k



	Cartwright	Locke-Hall	Kerwin-Spence	Estey-Nolan-Martland	Rand-Ritchie	Kellock-Judson	Abbott	Fauteux	Taschereau
Cartwright	50	57	58	52	40	44	41	29	
Locke-Hall	50	86	55	39	46	44	45	54	
Kerwin-Spence	57	86	78	54	40	55	33	20	
Estey-Nolan-Martland	58	55	78	92	60	67	33	20	
Rand-Ritchie	52	39	54	92	69	56	50	39	
Kellock-Judson	40	46	40	60	69		90	50	44
Abbott	44	44	55	67	56	90		64	54
Fauteux	41	45	33	33	50	50	64		92
Taschereau	29	54	20	20	39	44	54		92

24 cases

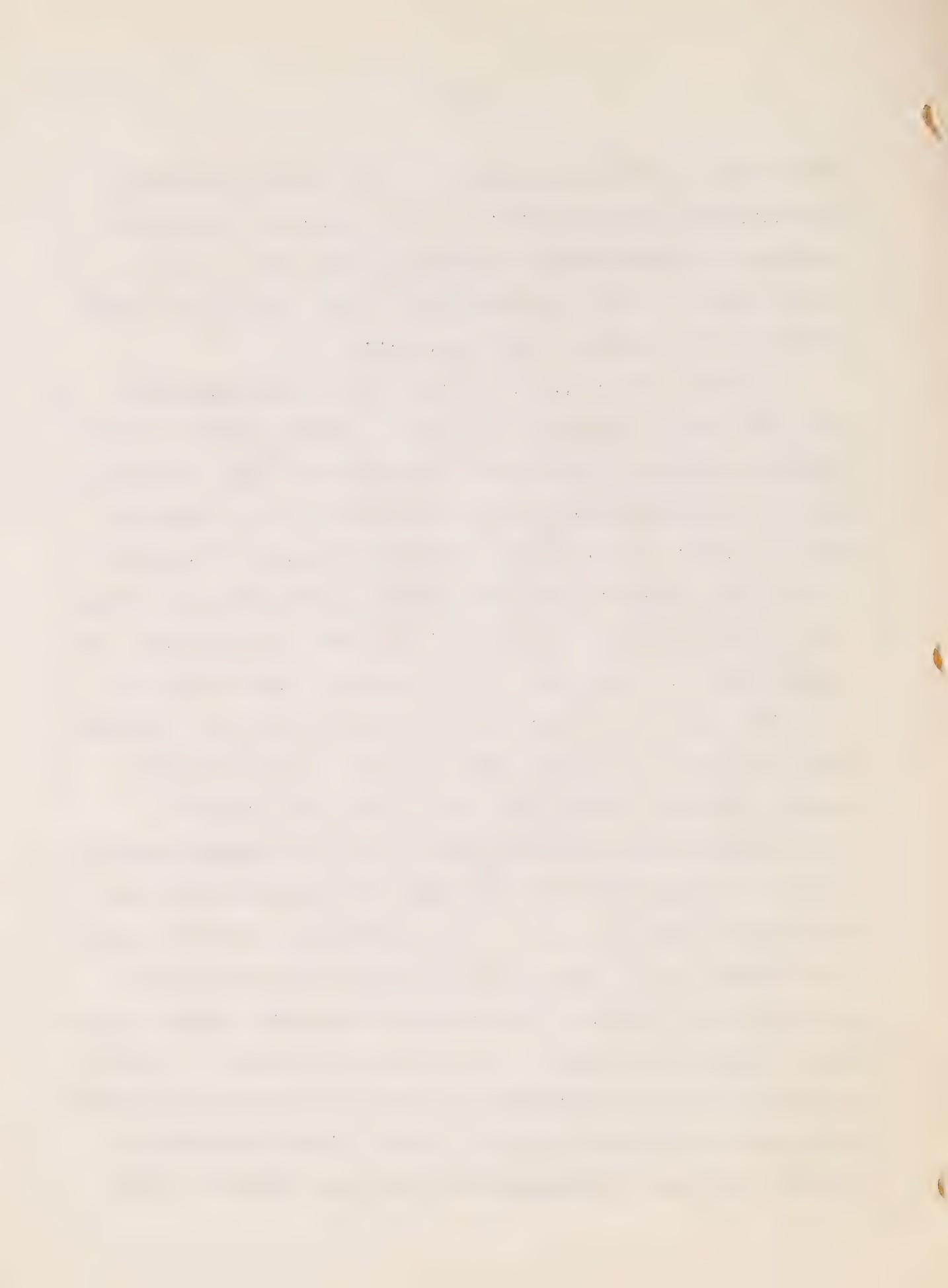
Ratios of Interagreement in Split Decisions in Civil & Bicultural Issue Cases, "Abbott" Courts, 1954-1964

Table 71



across their columns from right to left. Justice Abbott's participation in the majority, however, does not follow this tendency and there really is nothing distinctive about his voting behavior which distinguishes it from that of the other members of the English-speaking majority.

Tables 7k and 7l recording ratios of interagreement for every pair of judges underline the extent to which Justice Abbott's replacing Chief Justice Renfret eroded the cohesiveness of the Quebec bloc in these categories of controversy. While Justices Fauteux and Taschereau continued to experience a very high degree of agreement (90% and 92% in the two tables), when Justice Abbott's record is taken into consideration, the average ratio of agreement for the Quebec judges turns out to be 73% and 70% for civil liberties cases and civil liberties plus bicultural issue cases respectively. Among the non-Quebec judges it is more difficult to pick out any well-defined blocs than it was for the earlier period; with Justice Judson's voting bracketed with Justice Kellock's, it becomes difficult to discern a centre bloc within the non-Quebec group. The combination of Justices Kellock and Judson would seem to have had nearly as much in common with the Quebec judges as with their non-Quebec brethren. The closest we can get to a centre bloc is the trio of combinations constituted by Justices Kerwin and Spence, the prairie Justices, Estey, Nolan and Martland and the Maritimes' representatives, Rand and Ritchie. Their



average ratio of interagreement was a high .86% for the civil liberties cases, although this still does not sharply distinguish them from the other English-speaking members of the Court. For the larger group of cases upon which Table 71 is based, their Index of Interagreement falls to .75% and if Judge Abbott is included in this possible bloc instead of Justices Kerwin and Spence the Index only declines one point to 74%.

We shall again make a very cursory examination of the issues involved in the cases upon which these tables were based in order to interpret the statistical voting trends which the tables reveal. Looking first at the civil liberties case which produced the dissents of the French-Canadian judges, we find four very prominent cases which attracted nation-wide attention. Two of these, Lamb v. Benoit [1959] S.C.R. 321 and Roncarelli v. Duplessis [1959] S.C.R. 121 resulted from actions taken by Quebec authorities against members of the Jehovah's Witness religious sect. In the Lamb case the three Quebec judges disagreed with their six common law colleagues who upheld an action for damages brought by a Jehovah's Witness against Quebec police officers who, she alleged, had unproperly arrested her. But in the Roncarelli case, Abbott sided with the majority, while Cartwright joined the two French-Canadian judges who denied that Premier Duplessis had exceeded his powers in revoking the liquor license of Roncarelli, the



Jehovah's Witness restauranter who had acted as a bondsman for members of his sect charged with violating municipal by-laws. The third case in this group, Switzman v. Elbling S.C.R. 285, resulted in the invalidation of Quebec's notorious "Padlock Law", but here Justice Taschereau dissented alone against all eight of his fellow judges. In the fourth case, Brodie, Dansky, Rubin v. The Queen [1962] S.C.R. 681 in which the Court's majority held Lawrence's novel, Lady Chatterly's Lover not to be obscene, the Court's division appears to have been based more on religious orientations, with the Court's three Roman Catholics joined in dissent by Justice Locke.

The other three cases in which Justices Taschereau or Fauteux were in the minority do not seem to involve the kind of issues capable of producing a bicultural division of the Court. In Canadian Fishing Co. Ltd. et. al. v. Smith et al [1962] S.C.R. 294, all three Quebec judges together with Justice Judson were in dissent, but the central issue involved in the case was whether the Restrictive Trade Practices Commission should be restrained from making available to the various parties against whom allegations had been made all the documents and evidence gathered by the Director of Research under the Combines Investigation Act. Taschereau's other dissent came in The Queen v. Neil [1957] S.C.R. 685 where, together with Justice Locke, he disagreed with the majority's opinion that the evidence produced at Neil's trial



was insufficient to warrant finding him guilty of being a criminal sexual psychopath. Similarly Justice Fauteux's other dissent came when he sided against the accused in a criminal case. This was in Beaver v. The Queen [1957] S.C.R. 531 where supported by Justice Abbott, he disagreed with a majority judgment written by Justice Cartwright to the effect that the principle of mens rea should be read into some of the offences defined in the Opium and Narcotic Drug Act.

Justice Cartwright was again, in this series of cases, the other main dissenter. And again a number of dissents found him defending an individual's rights or freedom against what he deemed to be the improper exercise of power or pursuit of social policies by public authorities. Two of these cases concerned the Lord's Day Act. In the first of these, Gordon v. The Queen [1961] S.C.R. 592, he dissented alone against all of his fellow justices who held that the Act applied to an automatic laundry business. In Robertson and Rosetanni v. The Queen, [1963] S.C.R. 651, where the majority consisting of the three Quebec judges plus Justice Ritchie held that Section 4 of the Lord's Day Act prohibiting the operation of normal business undertakings on Sundays did not violate the Canadian Bill of Rights, he again dissented alone. He was involved in another solo dissent, this time against Justices Abbott, Taschereau, Judson and Hall in Espaillet-Rodriquez v. The Queen [1964] S.C.R. 3, where he defended the right of an ex-diplomat of the Dominican Republic, who was subject to an



Immigration Department deportation order, to a fair hearing and a real opportunity to qualify for immigrant status. In Frei v. The Queen [1956] S.C.R. 462, Justice Cartwright joined by Justice Rand, argued unsuccessfully for an immigrant farmer's right to a larger compensation payment for lands expropriated by the Crown.

Justice Cartwright's other two dissents were in cases which raised questions relating to trade union activities. The first case, Patchett & Sons Ltd. v. Pacific Great Eastern Railway Co. [1959] S.C.R. 271 involved the failure of a railway company to provide services to a struck plant. Justice Cartwright agreed with Justice Locke and found the railway company liable for the failure because it neglected to explain to its employees that their refusal to cross the picket-lines would be unlawful. Here he refused to impute to the employees knowledge of the unlawfulness of their action or to presume that they would have deliberately acted unlawfully. In the second case, Oil Chemical and Atomic Workers' International Union v Imperial Oil [1963] S.C.R. 584, he upheld the political rights of trade unions and together with Justices Abbott and Judson dissented from the majority's finding that a British Columbia statute preventing Trade Unions from using their funds either directly or indirectly to support a political party was constitutional.

There were other occasions when the balance of power on the Court was more favourable to Justice Cartwright's position. In the Neil and Beaver cases where we noted dissents by Taschereau and Fauteux respectively, Cartwright



was part of the majority which took the side of the accused in these criminal actions. Again in Beatty et al v. Kozak [1958] S.C.R. 177, Justice Cartwright lead a majority with Justice Rand alone dissenting, in upholding a claim for damages brought against two Saskatchewan law-officers who without warrant had imprisoned a woman accused by her relatives of being mentally ill. The case of E. Gagnon et al v. Foundation Maritime Ltd. [1961] S.C.R. 435, on the other hand, raised a question relating to trade unionism. On this occasion, in a division involving only non-Quebec judges, Justice Cartwright sided with the majority which found the union organizers guilty of a tortuous conspiracy in picketing and halting work on a construction site in order to gain recognition without certification.

Dennis v. The Queen [1958] S.C.R. 473, along with the Robertson & Rosetanni case (in which the Lord's Day Act was upheld) were examples of civil liberties cases in which the Quebec judges were the dominant element in the majority. In the Dennis case in which an individual's right to a new trial was at stake, Justices Taschereau and Fauteux joined by Justice Locke successfully upheld the Crown's side of the case, against Chief Justice Kerwin and Justice Martland. The final case in this group of 17 civil liberties cases provides an interesting example of the variations and shifts that different circumstances could bring about in the Supreme Court's alignment. In Metropolitan Toronto v. Village of

Forest Hill an unexpected alliance of the three Quebec judges, Justice Cartwright and Justice Rand denied Metropolitan Toronto the power of fluoridating the metropolitan water supply. Chief Justice Kerwin and Justice Locke dissented. The case provided an interesting application of Justice Cartwright's individualist liberal philosophy: in his view the power vested in the Metropolitan authority to secure a supply of pure and wholesome water did not include the power to provide through that water system for "the compulsory preventative medication of the inhabitants of the area", [1957] S.C.R. 569 (at p. 580).

The seven bicultural issue cases which were added to the civil liberties cases to form the basis of Tables 7h, 7j and 7l did not have any marked bearing on the voting patterns which we traced through the civil liberties cases. None of these cases produced a dissent by either Justice Taschereau or Justice Fauteux, and Justice Cartwright only dissented once. Six of the seven cases touched on various aspects of family relations, (Hepton v. Maat [1957] S.C.R. 606 - custody of children, Hellens v Densmore [1957] S.C.R. 768 - validity of a marriage; Little v. Little [1958] S.C.R. 566 - divorce, Thompson v. Thompson [1961] S.C.R. 3 - property in marriage; Kruger v. Brooker [1961] S.C.R. 231 - custody of children; In Re Gage Ketterer et al v. Griffith et al [1962] S.C.R. 251 - inheritance). In the seventh case, A.-G. Ont. v. Barfried Enterprizes [1963] S.C.R. 570, the Court upheld the validity of Ontario's Unconscionable Transactions Relief Act, with Justices Martland and Ritchie dissenting.



Looking back now at our bloc analysis of the Supreme Court's divisions in what we have defined as civil liberties and bicultural issue cases over the entire fifteen-year period, we might ask to what extent the Court's divisions in these controversies would appear to be explicable in bicultural - i.e. essentially French-English-terms? The least we can say in answer to that question is that there was a hard core of cases raising provocative issues upon which the French-Catholic members of the Court nearly always agreed and were always defeated by the English-Protestant majority. Most notable here were the four cases involving clashes between the Jehovah's Witnesses and the Quebec Government, namely the Boucher, Saumur, Lamb and Roncarelli cases. Along with these were four other cases containing issues with quite an immediate relationship to religious or ethical values, namely McKee v. McKee, Taillon v. Donaldson, The King v. The Assessors of the Town of Sunnybrae Ltd. and the Brodie case in which French-Canadian Quebec judges were on the minority side of the Court. It is also noteworthy that Justice Abbott, the English Protestant replacement of Chief Justice Rinfret was clearly less consistently in accord than was his predecessor with Justices Tachereau and Fauteux.

Still it would be a mistake to explain this voting trend in terms of French-Canadian values being simply outvoted by English-Canadian values in areas of law suspected of

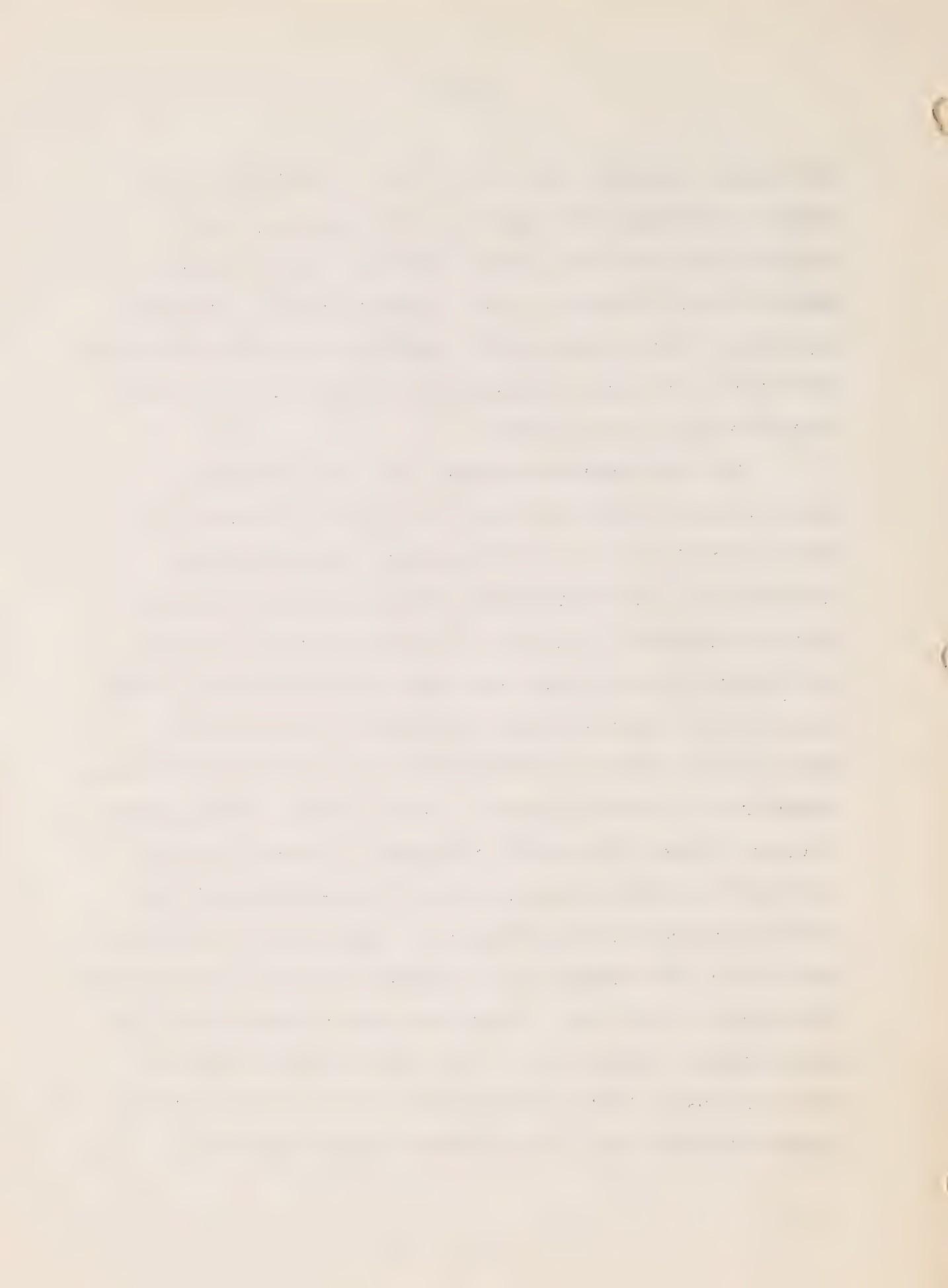


being especially sensitive to such a conflict of ethnic values. For the reasons advanced in Chapter II we cannot assume that the cause of this series of divisions is simply the fact that one group of judges are products of French-Canadian culture and the others of English-Canadian culture. The difference of ethnic backgrounds may be a necessary but by no means sufficient cause of these divisions. That is why it is necessary, in order to assess the extent to which this voting pattern is an essentially bicultural phenomena, we must in the next chapter attempt a more careful qualitative analysis of the character of the conflict of attitudes in the most prominent cases in this area. There we must at least reflect on the reasonableness of identifying the values explicitly or implicitly manifested by the judges in these cases with either of Canada's major ethnic groups.

Although we must suspend judgment on the determinants of the Court's divisions in these cases, our analysis of these divisions at least shows the extent to which there is an identifiable power-structure at work in these cases. Clearly the English-Protestant majority on the Court have had a greater influence in determining the outcome of these cases than the French-Catholic minority. Particularly in the first five years of the post-1949 period, four members of this group, Justices Rand, Kerwin, Kellock and Estey showed a high degree of cohesion, and formed the nucleus of the majority which prevailed in the direct confrontations with

the Quebec minority. But in the latter decade with both Justice Cartwright and Justice Locke relatively less isolated than they were on the "Rinfret" Court, and with Justice Abbott showing as much affinity for the non-Quebec majority as for his provincial confrères it becomes much more difficult to discern any significant variation of influence among the Anglo-Saxon judges.

The one English-speaking judge who, outside of those critical cases involving the Jehovah's Witnesses in Quebec, manifested a fairly consistent and well-defined commitment to certain individualistic liberal values was Justice Cartwright. But the fluctuations in his fortunes, particularly over the last ten years illustrate the shifting nature of the Court's balance of power in these cases. Aside from the direct confrontations with the French-Catholic judges in the Jehovah's Witness cases and the other quartet of cases raising provocative religious or moral questions, the Court's majority does not seem to have exercised its power in any predictable direction. Unless we are willing to believe that the members of the Court's majority kept changing their minds on the basic values involved in these cases, the more plausible explanation of the lack of any discernible relationships is that the bulk of the cases did not turn on a simple bipolar set of alternative value-judgments.



(v) Voting in Cases Involving Quebec's Civil Code

The Civil Code cases upon which this analysis are based are derived from Question 8 of our main questionnaire which was applied to all of the Supreme Court's post-1949 decisions.¹ They include all the Court's split decisions in those cases in which the application or interpretation of Quebec's Civil Code was a central issue. In the final section of this chapter we shall study the Supreme Court's disposition of Quebec appeals from the Court's beginning until the end of 1964. There our aim will be to discover the weight, direction and variations over time of the non-Quebec judges' participation in the various types of Quebec appeal cases. Here we shall apply the same kind of bloc-analysis as we have been using above to the Court's divisions in Civil Code cases² in the past - 1949 period, with a view to ascertaining the extent to which provincial or ethnic blocs function in those cases.

In Tables 8a to 8f we have set out dissenting pairs, assenting pairs and ratios of interagreement for Supreme Court divisions in Civil Code cases and have organized the data into the same two "Rinfret" and "Abbot" periods as

¹See below, Appendix III.

²In sub-section vi a more refined system for classifying cases into the various legal categories was used so that cases turning solely on the Civil Code were distinguished from those in which questions relating to the Civil Code were associated with the interpretation of Quebec or Federal Statutes. Thus the Civil Code cases used as a base for this table will not necessarily coincide with those referred to as Civil Code cases in the post-1949 period in sub-section vi.

were used in the preceding sub-sections. Contrasting this series of Tables with the civil-liberties and bicultural issue Tables which we examined above, we can observe that the most obvious difference between French-English relations on the Court in the two sets of cases, is that the Quebec Judges have been far more effective in determining the Court's decisions in the Civil Code cases than in the civil liberties and bicultural issue cases. The Assent Tables 8b and 8e show that the Quebec judges have been more frequently on the majority side in these divisions¹ than have the non-Quebec judges. Certainly this is a switch from the situation in the civil liberties and bicultural issue cases. Of course, in part, this difference can be explained simply by the tendency for the Court to be composed differently when sitting for the two sets of cases. For most Civil Code cases five judges sit, three of whom are almost always the Quebec judges, whereas in a great many of the bicultural issue and civil liberties cases the Quebec judges were part of a seven-or nine-judge Court which, ceteris paribus, meant that it was less likely that they would be on the majority side in the Court's divisions.

What is more surprising than the Quebec judges' higher level of participation in the majority in these cases is their relative lack of cohesiveness compared with their own record in the civil liberties and bicultural issue

¹The bracketed figures on the diagonal record the number of times each judge assented.

	Taschereau	Rinfret	Fauteux	Estey	Kerwin	Locke	Kellock	Cartwright	Rand
Taschereau	(7)	2	3	0	0	1	1	1	6
Rinfret	2	(6)	1	0	0	0	1	1	2
Fauteux	3	1	(4)	0	0	0	1	0	1
Estey	0	0	0	(1)	0	0	0	0	0
Kerwin	0	0	0	0	(1)	0	1	0	0
Locke	0	0	0	0	0	0	0	0	0
Kellock	0	0	0	0	1	0	(4)	0	1
Cartwright	1	1	1	1	0	0	0	(3)	1
Rand	0	2	0	0	0	0	0	1	(6)

18 cases

Paired Agreement in Dissent in Civil Code

Cases, "Rinfret" Court, 1950-1954

Table 8a

	Taschereau	Rinfret	Fauteux	Estey	Kerwin	Locke	Kellock	Cartwright	Rand
Taschereau	(11)	6	8	3	2	2	-	4	1
Rinfret	6	(10)	5	5	1	3	2	2	3
Fauteux	8	5	(10)	2	3	-	1	6	1
Estey	3	5	2	(1)	1	2	2	2	2
Kerwin	2	1	3	1	(4)	1	2	2	2
Locke	2	3	-	2	1	(5)	2	1	3
Kellock	-	2	1	2	2	2	(4)	2	3
Cartwright	4	2	6	2	2	1	2	(8)	2
Rand	-	3	1	2	2	3	-	2	(5)

18 cases

Paired Agreement in Assent in Split Decisions in
Civil Code Cases, "Rinfret" Court, 1950-1954

Table 8b

	Taschereau	Fauteux	Rinfret	Estey	Kerwin	Locke	Kellock	Cartwright	Rand
Taschereau	79	50	38	45	40	-	45	-	-
Fauteux	79	50	33	60	-	29	78	13	-
Rinfret	50	50	71	20	60	50	33	50	-
Estey	38	33	71	100	67	100	75	50	-
Kerwin	45	60	20	100	-	100	100	67	67
Locke	40	-	60	67	100	-	100	33	75
Kellock	-	29	50	100	100	100	-	40	100
Cartwright	45	78	33	75	67	33	40	-	50
Rand	-	13	50	50	67	75	100	50	-

18 cases

Ratios of Interagreement in Split Decisions in Civil
Code Cases, "Rinfret" Court, 1950-1954

Table 8c

	Taschereau	Fauteux	Abbott	Estey-Nolan-Martland	Kerwin-Spence	Kellock-Judson	Locke-Hall	Rand-Ritchie	Cartwright
Taschereau	(8)	6	1	1	1	1	1	1	1
Fauteux	6	(7)	1	1	1	1	1	1	1
Abbott	1	1	(3)	1	1	1	1	1	1
Estey-Nolan-Martland	1	1	1	(1)	1	1	1	1	1
Kerwin-Spence	1	1	1	1	(1)	1	1	1	1
Kellock-Judson	1	1	1	1	(2)	1	1	1	1
Locke-Hall	1	1	1	(4)	1	1	1	1	1
Rand-Ritchie	1	1	1	1	1	1	(9)	4	1
Cartwright	1	1	1	1	1	1	4	(9)	1

26 cases

Paired Agreement in Dissent in Civil Code

Cases, "Abbott" Courts, 1954-1964

Table 8d

	Taschereau	Fauteux	Abbott	Estey-Nolan-Martland	Kerwin-Spence	Kellock-Judson	Locke-Hall	Rand-Ritchie	Cartwright
Taschereau	(18)	16	14	4	4	1	1	4	3
Fauteux	16	(18)	14	4	5	1	1	3	4
Abbott	14	14	(20)	4	10	3	1	4	4
Estey-Nolan-Martland	4	4	4	(7)	3	2	2	3	2
Kerwin-Spence	4	5	10	3	(11)	4	2	2	4
Kellock-Judson	1	1	3	2	4	(6)	3	3	3
Locke-Hall	1	1	1	2	2	3	(3)	3	2
Rand-Ritchie	4	3	4	3	2	3	3	(6)	1
Cartwright	3	4	4	2	4	3	2	1	(8)

26 cases

Paired Agreement in Assent in Split Decisions in Civil Code Cases, "Abbott" Courts, 1954-1964

Table 8e

	Taschereau	Fauteux	Abbott	Estey-Nolan-Martland	Kerwin-Spence	Kellock-Judson	Locek-Hall	Rand-Ritchie	Cartwright
Taschereau	88	65	57	33	13	14	27	23	
Fauteux	88	68	67	42	25	14	21	31	
Abbott	65	68	67	92	50	17	39	29	
Estey-Nolan-Martland	57	67	67	100	100	100	50	50	
Kerwin-Spence	33	42	92	100	80	50	67	57	
Kellock-Judson	13	25	50	100	80	75	100	60	
Locke-Hall	14	14	17	100	50	75	50	40	
Rand-Ritchie	27	21	39	50	67	100	50		50
Cartwright	23	31	29	50	57	60	40	50	

26 cases

Ratios of Interagreement in Split Decisions in Civil Code Cases, "Abbott" Courts, 1954-1964

Table 8f

cases and that of a group of non-Quebec judges in these Civil Code decisions. Of course, we must remember that we are dealing here only with split decisions in Civil Code cases and that besides these 44 cases there are 144 others in which the Court was unanimous. Still it is significant that when the Court divided on questions relating to the Civil Code, Chief Justice Rinfret agreed with his fellow civilians only 50% of the time. Also it is interesting that with Justice Abbott replacing Chief Justice Rinfret, the civilians become a more cohesive group, with an Index of Interagreement of .74 compared with one of just under .60 for the "Rinfret" Court. Still in those cases where the civilians split, the balance of power on a five-judge court would certainly shift away from the civilians and the common-law judges would be in a position to determine the outcome of the civilian controversy. Thus it is significant that compared to the moderate level of interagreement exhibited by the civilian judges, a quartet of common law judges, Justices Estey, Kerwin, Kellock and Locke (and their replacements) displayed a much higher degree of cohesiveness -.95 in the first five years and .84 in the last 10.

Indeed when we begin to put these Tables together and take into account the relative participation of each group of judges in these decisions, a fairly distinct pattern emerges. The four common-law judges who displayed a very high propensity to agree with one another were also the four judges who

participated the least in these Civil Code decisions.¹ They were also the four who dissented the least both in aggregate and proportionate terms. Of the 60 votes cast by Justices Estey, Kerwin, Kellock, Locke and their replacements in these 44 Civil Code decisions, only 12 or 20% recorded dissents. Compared with this the civilian Quebec judges cast 122 votes, of which 35 or 29% were in dissent. At the other corner of the Court, Justices Cartwright and Rand (with Justice Ritchie), the most active common law participants in Civil Code divisions, cast half of their 54 votes in dissent.²

We should further note that unlike common law judges who were relatively infrequent participants in these cases, Justices Cartwright and Rand (or Ritchie) were relatively independent of each other, their ratio of agreement being only 50% throughout. What this indicates is that within the group of five judges - the three civilians and Justices Cartwright, Rand or Ritchie - who took part most often in these Civil Code cases, the balance of power, on the whole, favoured the civilians. The three civilians with their greater cohesiveness have more often than not prevailed in a division against either or both of these common law judges. And even when the civilian judges split, there was a good chance that Justices Rand and Cartwright would also split, if both were present together, so that on a five-judge court two civilians would still dominate the majority. However, when the other common law judges entered

¹This is true not only for split decisions but for all Civil Code decisions and, indeed, for all Quebec cases. See above p. 166, Table 1b.

²This difference in the dissent rates of the three groups is significant at the 1% level.

into these decisions the picture was likely to change. If, for instance two of them were participating together, on a five-judge court when the civilians split, they would most likely, with their tendency to vote as one judge, determine the outcome of the case. Furthermore, we can see from the Interagreement Tables 8c and 8f that the members of this common law bloc in the centre of each table were in agreement with the two common law judges, to their right.

Justices Cartwright and Rand (or Ritchie), proportionately more often than with the civilian judges to their left.

Thus on balance this group of common law judges would appear to have used their majoritarian power more in support of the common law "veterans" in these Civil Code divisions than in support of the civilian judges.

We cannot in this merely quantitative study of the Court's power structure assess the real impact which this voting-pattern has had on Quebec's distinctive system of private law. However, if one accepts the assumption shared by most of the Supreme Court Quebec critics that judges whose educational and professional experience has not been in the civil law tradition are necessarily less competent in civil law matters than those judges who have been formally trained in the civilian system, than the voting pattern we have traced may be viewed as a disquieting trend. For one way of interpreting this phenomenon is to look upon all these cases as involving strictly technical questions of Quebec civil law. From this point of view the voting-pattern we have traced might be interpreted as showing that the common law

judges who are least experienced in adjudicating Quebec civil law disputes, take part in some of the more contentious disputes centering on the Civil Code and frequently decide the issue by throwing their weight against the civilian judges on the Court. But it might also be argued that many of these so-called "Civil-Code" cases are contentious because they involve issues which go beyond a simple dichotomy of civil law versus common law legal concepts. We know for instance that a number of cases included in this group such as Roncarelli v. Duplessis [1959] S.C.R. 321 and Lamb v. Benoit [1959] S.C.R. 321, besides involving questions related to the interpretation of Quebec's Civil Code, also, in the eyes of some judges, raised broad questions of civil liberties. In these cases instead of interpreting the common law judges' defeat of two or three civilian judges as the result of a rather amateurish or alien treatment of Quebec civil law prevailing against a much more highly qualified version of civilian jurisprudence it might be more plausible to explain the division between the two groups of judges as stemming from the fact that on a normative rather than a strictly technical legal basis they have focussed on different values or issues as the crucial elements in the controversy.

Finally one general aspect of these Tables provides some further confirmation of the trend we have been tracing

with very few exceptions all of the non-Quebec judges have agreed with each other in these Civil Code appeals relatively more often than with the Quebec judges. If we look at the array of figures showing ratios of interagreement for the six common law judges we can see in both Table 8c and 8f how these ratios tend to decline as we move from the six columns on the right to the three columns on the left recording interagreement ratios for pairings of civilian and common law judges. The average ratio of interagreement among the non-Quebec judges was .69, whereas the average ratio of agreement of the six non-Quebec judges with the Quebec judges was only .37. Again the greater affinity which the non-Quebec judges have shown for each other in these Civil Code cases may stem from their common law approach to civil law matters or it might, in part, be the product of a broader normative divergence of the Anglo-Saxon judges from at least their French-Canadian civilian colleagues.

(vi) Voting Patterns in Constitutional Cases and Other Legal Categories

The same methods of bloc-analysis which were used above in analyzing judicial voting behaviour in civil

liberties, bicultural issue, and Civil Code cases were also applied to the Supreme Court's post-1949 reported decisions in four other areas - constitutional law, governmental litigation (non-criminal), common law and criminal law. In none of these areas, however, did bloc-analysis reveal a marked tendency for the Court to divide along bicultural or provincial lines. Consequently we have not set out all of these tables in the text, nor commented on this material in any detailed way.

Of these four areas, the one in which bloc behavior might be regarded as most significant and, perhaps, be most expected, is constitution law. Thus we have, in a rather contracted way, set out the voting record in the Supreme Court's split decisions dealing with constitutional challenges to the validity of legislation since 1949. There were 17 such cases in the entire 15 year period under review. In Tables 9a, 9b and 9c we have recorded dissenting pairs, assenting pairs and ratios of agreement, respectively, for the entire set of 17 cases. We have been able to present this data in the form of a nine-judge table by an even more extensive contraction than was used above, for here we have welded together the records of Chief Justice Rinfret and Justice Abbott so that only the records of the three judges - Taschereau, Fauteux and Cartwright - who served throughout the entire period, are presented in their pure form. Still we feel that nothing is lost this way in terms of revealing bloc behavior. Our study of the voting-patterns



on each Court did not indicate any suggestion of bloc behavior which might be masked by the rather extreme form of contraction used in building these Tables.

When we examine these three Tables, we do see at least the suggestion of a voting-pattern with possible bicultural determinants, operating in these cases. Looking first at Table 9c, we can see that at the top right-hand corner, Justices Taschereau and Fauteux were paired together in a high (91) percentage of cases. At the opposite corner we observe that Justice Cartwright and the combination of Justices Locke and Hall were paired together in 80% of their joint participations and that their ratios of interagreement with the other judges tend to decline as we move across the Table from right to left towards the Quebec justices. However, the significance of this particular pattern as something peculiar to the Court's divisions of opinion on Constitutional law diminishes somewhat when we compare Table 9c with Tables 6a and 6b above showing ratios of inter-agreement for the Court's split decisions in all types of law in the post-1949 years. This comparison shows that to a degree the voting-pattern in constitutional controversies is a microcosm of the general alignments on the Court, particularly the general set of relationships at work from 1954 to 1964. The close alliance of Justices Taschereau and Fauteux has been a constant factor in the Court's divisions and was only slightly more intense in these constitutional cases than

	Taschereau	Fauteux	Rinfret-Abbott	Kerwin-Spence	Estey-Nolan-Martland	Kellock-Judson	Rand-Ritchie	Locke-Hall	Cartwright
Taschereau	(3)	1	1	1	—	—	—	—	—
Fauteux	1	(1)	1	—	—	—	—	—	—
Rinfret-Abbott	1	1	(3)	—	—	1	—	—	1
Kerwin-Spence	1	—	—	(3)	2	—	—	—	—
Estey-Nolan-Martland	—	—	—	2	(5)	—	1	1	1
Kellock-Judson	—	—	—	—	—	(1)	—	—	1
Rand-Ritchie	—	—	—	—	1	—	(2)	1	1
Locke-Hall	—	—	—	—	1	—	1	(6)	4
Cartwright	—	—	1	—	1	1	1	4	(7)

17 cases

Paired Agreement in Dissent in Constitutional

Cases 1950-1964

Table 9a

	Taschereau	Fauteux	Rinfret-Abbott	Kerwin-Spence	Estey-Nolan-Martland	Kellock-Judson	Rand-Ritchie	Locke-Hall	Cartwright
Taschereau	(13)	9	7	9	7	10	10	6	7
Fauteux	9	(10)	6	8	7	8	8	4	4
Rinfret-Abbott	7	6	(9)	8	6	7	6	4	3
Kerwin-Spence	9	8	8	(12)	9	11	9	5	6
Estey-Nolan-Martland	7	7	6	9	(11)	9	9	5	5
Kellock-Judson	10	8	7	11	9	(14)	10	7	9
Rand-Ritchie	10	8	6	9	9	10	(13)	7	8
Locke-Hall	6	4	4	5	5	7	7	(9)	8
Cartwright	7	4	3	6	5	9	8	8	(10)

17 cases

Paired Agreement in Assent in Split Decisions in
Constitutional Cases, 1950-1964

Table 9b

	Taschereau	Fauteux	Rinfret-Abbott	Kerwin-Spence	Estey-Nolan-Martland	Kellock-Judson	Rand-Ritchie	Lake-Hall	Cartwright
Taschereau	91	73	71	97	71	67	40	44	
Fauteux	91	77	89	70	80	73	40	36	
Rinfret-Abbott	73	77		73	50	80	60	40	33
Kerwin-Spence	77	89	73		79	85	69	36	40
Estey-Nolan-Martland	47	70	50	79		64	71	43	38
Kellock-Judson	71	80	80	85	64		77	54	67
Rand-Ritchie	67	73	60	69	71	77		57	60
Locke-Hall	40	40	40	36	43	54	57		80
Cartwright	44	36	33	40	38	67	60	80	

17 cases

Ratios of Interagreement in Split Decisions in
Constitutional Cases, 1950-1964

Table 9c

it was on the average in all of the Court's split decisions. Also Justice Cartwright's and Locke's¹ relative isolation from their fellow-judges was again a general phenomenon of the last decade, although in constitutional law their ratios of agreement show a much greater tendency to slope off from their own high level of accord to much lower ratios of agreement with the other members of the Court.

When we examine the Dissent and Assent Tables, again, it is difficult to discover anything distinctive about the voting behavior of the Quebec judges in these constitutional law decisions. Unlike their record in bicultural issue and civil liberties cases their quantity of dissents is about average and, similarly, in contrast with their record in Civil Code split decisions their participation in the majority is, on the whole, indistinguishable from that of the centre group of non-Quebec judges.

The most significant voting trend shown by these tables is related to the record of Justice Cartwright. As we can see from the tables he was the most frequent dissenter and aside from his relatively close alliance with Justice Locke, was more often than not in disagreement with his colleagues' interpretation of the B.N.A. Act. When we examine the actual cases which provoked Justice Cartwright's dissents

¹Justice Hall served for such a small part of this whole epoch that his contribution to this pattern is negligible.

we find that his position was consistently adverse to provincial interests. In six of the seven constitutional cases in which Justice Cartwright dissented, the Court's majority found a provincial Act valid.¹ We might further note that Justices Taschereau and Fauteux were members of the majority in all six of these cases and Justice Abbott participated in the majority in all but one.

Justice Cartwright's six dissents came in the last seven years of the post-1949 period, at a time when provincial aggressiveness and the spirit of co-operative federalism were beginning to reverse the centralist trend of Canada's post-war federal systems. On the Supreme Court the majority against whom Cartwright was frequently dissenting seem to reflect this trend in Canadian federalism by their marked willingness to find a constitutional basis for some of the provinces' new legislative ventures. But this apparent conflict between Justice Cartwright and, from the provinces' point of view, the more accommodating Supreme Court majority, could not be explained in terms of either bicultural or provincial blocs. In only one of Justice Cartwright's six defeats, (The Oil Chemical and Atomic Workers' case) was the

¹ These cases were as follows: Reference Re. The Farm Products Marketing Act (Ont.) [1957] S.C.R. 198; Re. Validity of Section 92(4) of The Vehicles Act, 1957 (Sask.) [1958] S.C.R. 608; O'Grady v. Sparling [1960] S.C.R. 804; Stephens v. The Queen [1960] S.C.R. 823; Smith v. The Queen [1960] S.C.R. 776; Oil Chemical and Atomic Workers' International Union v. Imperial Oil [1963] S.C.R. 584.

division close. In the other five cases it was a broad alliance of English and French-Canadian judges from a variety of provinces that held the balance of power.

While we have not set out here the Supreme Court's voting patterns in the other legal categories investigated, we have certainly examined all of the Tables produced for these groups of cases and none of them revealed even as marked voting patterns as we detected in constitutional cases. This negative evidence, of course, showing the absence of bicultural or provincial divisions of the Court in common law, criminal law and government litigation cases is in itself significant.

For anyone who might be interested in investigating any aspect of the Supreme Court's judges' voting behavior in the cases we have considered, we have a computer print-out recording for each set of cases, assenting and dissenting pairs as well as paired participation and absenteeism. These sets include all decisions, all split decisions and all close decisions in seven legal categories (civil liberties and bicultural issues, Civil Code, common law, criminal law, non-criminal governmental litigation and constitutional law) for each composition of the Court, as well as for several aggregated Courts. This print-out is far too large for us to duplicate it in our Appendices, but a copy of it can be obtained from the Director of this research project.

6. Quebec Appeals 1875 - 1964

In this part of our quantitative study we have undertaken an intensive examination of Quebec appeals to the Supreme Court from the Court's very beginning until the end of 1964. Again our data here consists of all the Court's reported decisions as found in the official Supreme Court Reports. To each case we have applied the following questions:

- 1) What type of law was involved?
- 2) How did the Supreme Court dispose of the appeal?
- 3) In what way did Quebec and non-Quebec judges participate in the Court's decision?
- 4) Who wrote the judgment(s)?

Unlike the lengthy questionnaire which was applied exclusively to the Court's post-1949 decisions, this short set of questions was answered mainly by reading the head-notes to cases rather than all of the opinions.

This questionnaire is, then, much briefer than that which was used on the post-1949 decisions. Three of the four questions can be answered quite objectively. The first question which concerns classifying the case into a particular legal category involves perhaps some degree of judgment on the part of the person administering the questionnaire. However, the legal categories which we have chosen are fairly simple and do not go beyond a purely legal taxonomy; there is no attempt to identify those cases, for instance, which have a bearing on important social or libertarian values. The

legal classifications employed here are shown across the top of Table 10. They are mutually exclusive and exhaustive. It might be noted that the category entitled "Federal Statute and Quebec Law" (column 4) includes cases in which the application of a Canadian statute is related to a question concerning Quebec's Civil Code. Also it should be noted that the classification "Criminal" (column 6) includes only federal criminal law cases. Thus the cases in columns 4 to 7 are all concerned with questions of federal import. The method of classifying the various outcomes of appeals is more refined than that used in the larger questionnaire. The various classifications are shown down the left side of Table 10. Appeals in which the Supreme Court agreed in part with the decision below are classed as "varied" (row 2) and those in which the case was decided not on the merits but on some jurisdictional ground are marked "jurisdictional" (row 4).

The main object of this quantitative analysis of Quebec appeals is simply to measure the weight and direction of the involvement of non-Quebec Supreme Court judges in Quebec appeal cases. In the historical section above we described how the question of common-law judges reviewing the decisions of Quebec courts has always been the principal source of Quebec hostility to the federal appeal court. Here we seek only to discover the extent to which non-Quebec judges have controlled the Supreme Court's decision-making in Quebec appeals and the legal areas in which the civilian judges have

most often been out-voted by their common-law colleagues. The only comparative dimensions to this study will be a comparison of the different periods in the Court's history with respect to its handling of Quebec appeals and a comparison of judicial participation in different categories of law.

Before embarking on an examination of the judges' roles in Quebec appeals, it is worthwhile to obtain an overall picture of the Supreme Court's treatment of Quebec appeals by looking at the data assembled in Table 10. This table presents a cross-tabulation of the various legal classifications with the Supreme Court's disposition of Quebec appeals. Table 10 does not show any very significant variations in the Supreme Court's approach to the different kinds of law involved in Quebec appeal cases. The one possible exception to this is column 5, showing a very low reversal rate for cases concerning federal statutes. However, it is clear that the principal reason for this is the fact that over 60% of these appeals turned on jurisdictional questions and consequently were not decided on the merits. Looking at the other columns it would appear that over the whole span of its appellate experience the Supreme Court has not shown a marked tendency in any particular legal category to follow or to upset the decision of the Quebec court of last resort. In cases concerned solely with the application of the Civil Code (column 1) or a Quebec statute (column 2), the percentages of cases in which the Supreme Court reversed or varied the

Type of Law

	1	2	3	4	5	6	7	8	Total
	Civil Code	Quebec Statute	Quebec Civil Code	Federal Statute & Quebec Law	Federal Statute	Criminal Statute	Constitutional	Other	
1. Affirmed	452 (.62)	93 (.62)	47 (.47)	29 (.41)	46 (.23)	38 (.43)	22 (.55)	4 (.51)	731 (.53)
2. Varied	.17 (.02)	.4 (.03)	.6 (.06)	.3 (.01)	.3 (.01)	.1 (.01)	.1 (.028)	0 (.02)	.35
3. Reversed	256 (.35)	42 (.28)	47 (.47)	27 (.38)	29 (.14)	40 (.45)	16 (.40)	3 (.43)	460 (.33)
4. Jurisdictional	7 (.01)	12 (.07)	0 (.00)	12 (.17)	124 (.62)	10 (.11)	1 (.025)	0 (1.00)	166
Total	732 (1.00)	151 (1.00)	100 (1.00)	71 (1.00)	202 (1.00)	89. (1.00)	40 (1.00)	7 (1.00)	1392

Quebec Appeals 1875-1964

Table 10

decision of the court below were slightly lower - 37% and 31% respectively - than in the other legal categories. However, this tendency is counterbalanced by the appellate record in the mixed categories (columns 3 and 4) where interpretation of the Civil Code was related to the application of a provincial or federal statute. Here the lower court decision was reversed or varied in 53% and 39% of the two categories respectively. Thus, in so far as Quebec's distinctive legal system was concerned, the Supreme Court over the years cannot be said to have shown a marked degree of respect for the judgments of Quebec's highest courts.

Perhaps the most interesting aspect of the data reported in Table 10 is simply what it reveals about the composition of the Supreme Court's case-load in Quebec appeals. Over half (53%) of all Quebec appeals have been essentially concerned with legal questions arising under Quebec's Civil Code. Moreover if we add to these cases those which are centred on Quebec statutory law or Quebec statutory law combined with the Civil Code, we find that 71% of the province's appeals to the Supreme Court have been primarily concerned with provincial law matters. Clearly, if, as some Quebec critics of the Court have advocated, the Court was reorganized so that a specialized ~~banc~~ of the Court was established to deal with civil law matters, this civilian chamber of the Court would hear the bulk of Quebec

appeals.¹

Now when we turn to examine the respective roles of Quebec and non-Quebec Supreme Court judges in Quebec appeals, the first point that must be emphasized is the essential difference between the pre-1949 and post-1949 periods. It will be recalled that the Supreme Court Amendment Act of 1949 which abolished Privy Council appeals also effected some important changes in the basic structure of the Supreme Court, one of which was to increase the number of judges from seven to nine with the requirement that three of the nine must be appointed from the bar or bench of Quebec. Originally the Court had been composed of six judges, two of whom had to be Quebec appointments. In 1927 a seventh judge was added but the requisite number of Quebec judges was not increased.

Thus in the pre-1949 period only two Quebec judges were required on the Court and this legal requirement was never exceeded. When we bear in mind that with very few exceptions five judges are needed to constitute a quorum and even in those few instances where the Act permits less than five,² it requires at least four, it is clear that prior to

¹Assuming, of course, that the Supreme Court's jurisdiction was not altered.

²Supreme Court Act, R.S.C. 1952 c.259, as amended by R.S.C. 1952, c. 335, 1956, c.48. Sections 28(2) and 29.

the addition of the third Quebec judge, the Quebec members of the Supreme Court in no appeal could constitute a majority of the Court. After 1949, when the Court sat as a five-judge court as it does for most appeals, the three Quebec judges could outnumber their common law brethren.

When we look at the actual figures for the Supreme Court's composition, it is apparent that the addition of one Quebec judge has had the effect of greatly increasing the potential power of Quebec judges to control the Court's decision-making in Quebec appeals. In just under three-quarters (180 of 246, or 73%) of all Quebec appeals among the Supreme Court's reported decisions since 1949 the three Quebec judges constituted a clear majority of the Court. 25 of the 66 cases in which the Quebec judges did not constitute a majority concerned federal legal issues: 15 of these were criminal cases and 5 were constitutional cases - *for these Cases* a seven-or nine-judge court usually sits. The remaining 41 were strictly concerned with provincial law matters: 34 solely with the Civil Code, 6 with the Civil Code and other Quebec statutory law and 1 with a Quebec statute alone. This group of 41 represents 22% of reported Quebec appeals in these provincial law matters for this 15-year period.

Although the evidence presented in the last paragraph demonstrates the real expansion of the Quebec judges influence over Quebec appeal cases which was produced by the addition to the Court of another Quebec judge in 1949, it may

still leave civilian critics of the Court dissatisfied. There are some who have advocated that as a minimal reform an ad hoc judge be added to the Court whenever in a Quebec appeal three Quebec judges cannot be present. The figures cited above suggest that if this reform were adopted at least for those cases which are concerned with provincial law matters, such ad hoc appointments would have to be made about five or six times a year.¹

Even though in 100% of Quebec appeals prior to the 1949 change the Quebec judges constituted less than a majority of the judges sitting for a case, it is still instructive to ascertain more precisely the role which the Quebec members of the Court played in the different categories of Quebec appeals. To do this we have cross-tabulated in Tables 11a to 11d the various types of law involved in Quebec appeals with the main alternative forms of participation of Quebec judges. First of all we have indicated the

¹If this procedure were followed there might have to be more than one ad hoc appointment for a case. In one post-1949 Quebec appeal there were no Quebec judges present and in several others, only one Quebec judge present. Note also that our estimate that these situations would arise five or six times a year is based on the assumption that the same trend we have found in the Supreme Court's reported decisions would be duplicated in its unreported decisions which are about as numerous as the reported decisions.

various ways in which the opinions of Quebec judges have failed to prevail in Quebec appeals, beginning with the few cases in which they have lost by default (i.e. in which there have been no Quebec judges present to hear the appeal), then those in which all the Quebec justices sitting on the case (one or two in the pre-1949 era, one, two, or three, after 1949) were defeated by judges from the other provinces and finally those in which the Quebec judges have not agreed with one another. The latter outcome where the Quebec judges split and came down on different sides of the case meant, of course, prior to 1949 that non-Quebec judges would necessarily constitute more than half of the majority. After 1949, if such split decisions occurred within a five-judge court, three of whom were from Quebec, it was still possible for a Quebec judge to dissent but leave his two provincial colleagues as the dominant element in the majority. We have also tabulated those cases in which the Quebec judges have all participated in the majority and we have shown separately those few decisions in which the Quebec justices constituted more than half the majority. Finally for the pre-1949 era we have indicated those cases in which only one of the two Quebec judges was present to participate in the majority.

In Tables 11a, 11b and 11c we have divided the pre-1949 years into three periods. The first period runs from the Court's beginning until 1895. It includes the terms of the

first two appointees, Jean Thomas Taschereau and the ex-Liberal Justice Minister, Télesphore Fournier and the first 17 years of Henri Elzear Taschereau's (Jean Thomas' cousin) term. The second period begins with the appointment of Désire Girouard who had been an outspoken parliamentary critic of the Court, and includes the term of another ex-Liberal Justice Minister, Sir Charles Fitzpatrick as well as the first seven years of Louis Brodeur's justiceship. The third period begins with the appointment of Pierre Mignault in 1918 and goes right up to the abolition of Privy Council appeals in 1949. Thus it includes besides Mignault's terms, that of Arthur Malouin and Arthur Cannon as well as the first 25 years of Thibaudeau Rinfret's justiceship and chief justiceship and the first decade of the present Chief Justice, Robert Taschereau's term. In Table 11d are included all of the post-1949 appeals, so that it covers cases heard by Chief Justice Rinfret, the present Chief Justice and the two Quebec judges appointed since 1949, Joseph Honoré, Gérald Fauteux (1949) and Douglas Abbott (1954).

Organizing the data in these periods represents a compromise between, on the one hand, not separating the data into different periods at all (or possibly simply into a pre-1949 and post-1949 period) and on the other hand, producing a separate Court for each combination of Quebec judges. The time divisions chosen might be regarded as representing

in Period I, - the Court's earliest days when as we have seen it was the object of sharp criticism from both English and French-speaking jurists; in Period II, - a time when the Court was emerging from the controversy of the 1870's and 1880's and beginning to assume a more secure position in the Canadian judicial structure; in Period III, - the period of its maturity when it was favoured by some particular strong Quebec appointments, especially Justices Mignault and Rinfret and finally in Period IV, - the Court's modern period when the Quebec judges have held the balance of power in a majority of Quebec appeals. On balance it was felt that this division of Quebec appeals into four periods might be a convenient way of revealing any significant general changes in the participation of Quebec judges which have taken place over time.

The first point of interest which emerges from these tables is that there appears to be no significant differences between the different legal categories in so far as the participation of Quebec members of the Supreme Court is concerned. The relative voting patterns of the Quebec and non-Quebec judges has shown little variation across the various classifications of law. Stated negatively this suggests that on the whole the non-Quebec judges have not shown any marked reluctance to disagree with their civilian colleagues in those appeals which are exclusively concerned with legal questions appertaining to Quebec's distinctive legal system. If we look at the figures in the second row of each table marking the cases in which

Type of Law

	1 Civil Code	2 Quebec Statute	3 Quebec Civil Code	4 Federal Statute	5 Federal Statute	6 Criminal Statute	7 Constitu- tional	8 Other	9 Totals
1. No Quebec Judges	0	0	0	0	0	0	0	0	0
2. Quebec Judges (1 or 2) - in Dissent	6 (.04)	2 (.06)	0	0 (.02)	0 (.17)	1 (.08)	1 (.08)	0	11 (.04)
3. Quebec Judges Split	29 (.21)	6 (.18)	5 (.46)	5 (.46)	10 (.16)	0	1 (.08)	0	56 (.21)
4. 1 Quebec Judge in Assent	24 (.19)	7 (.21)	4 (.36)	3 (.27)	19 (.30)	0	4 (.31)	0	61 (.23)
5. 2 Quebec Judges in Assent, but non- Quebec Judges 1/2 or more of majority	72 (.54)	18 (.55)	2 (.18)	3 (.27)	29 (.46)	5 (.83)	7 (.53)	0	136 (.50)
6. 2 Quebec Judges in Assent and more than 1/2 of majority	3 (.02)	0	0	4 (.06)	0	0	7 (.03)	0	7 (.03)
Totals	134 (1.00)	33 (1.00)	11 (1.00)	11 (1.00)	63 (1.00)	6 (1.00)	13 (1.00)	0	271 (1.00)

Quebec Judges Participation in Quebec Appeals - Period I (1877-1895)

Table 11a

Type of Law

1 Civil Code	2 Quebec Statute Code	3 Quebec Statuted Civil Code	4 Federal Statuted Civil Code	5 Federal Statuted Quebec Law	6 Criminal	7 Constitu- tional	8 Other	9 Totals
1. No Quebec Judges	(.00)	0	0	0	0	0	0	(.00)
2. Quebec Judges (1 or 2) - in Dissent	8 (.04)	3 (.06)	1 (.05)	1 (.04)	2 (.03)	0 0	0	15 (.04)
3. Quebec Judges Split	36 (.15)	6 (.12)	5 (.26)	2 (.08)	6 (.09)	4 (.44)	3 (.375)	62 (.15)
4. 1 Quebec Judge in Assent	65 (.28)	14 (.28)	5 (.26)	11 (.42)	19 (.25)	2 (.23)	2 (.25)	118 (.28)
5. 2 Quebec Judges in Assent, but non- Quebec Judges $\frac{1}{2}$ or more of majority	120 (.51)	25 (.50)	7 (.37)	12 (.46)	47 (.62)	3 (.33)	3 (.35)	217 (.51)
6. 2 Quebec Judges in Assent and more than $1/2$ of majority	6 (.03)	2 (.04)	1	0	2 (.02)	0	0	11 (.03)
Totals	236 (1.00)	50 (1.00)	19 (1.00)	26 (1.00)	76 (1.00)	9 (1.00)	8 (1.00)	424 (1.00)

Quebec Judges Participation in Quebec Appeals - Period II (1896-1918)

Table 11b

Type of Law

	1 Civil Code	2 Quebec Statute	3 Quebec Statute Civil Code	4 Federal Statute Quebec Law	5 Federal Statute	6 Criminal Statute	7 Constitu- tional	8 Other	9 Totals
1. No Quebec Judges	0	0	0	0	0	0	0	0	0
2. Quebec Judges (1 or 2) - in Dissent	4 (.02)	1 (.02)	1 (.02)	1 (.04)	1 (.02)	1 (.025)	0	0	9 (.02)
3. Quebec Judges Split	10 (.05)	4 (.07)	8 (.16)	1 (.04)	4 (.07)	1 (.025)	2 (.13)	0	30 (.07)
4. 1 Quebec Judge in Assent	38 (.18)	12 (.21)	5 (.10)	5 (.22)	8 (.14)	7 (.17)	3 (.20)	4 (.80)	82 (.18)
5. 2 Quebec Judges in Assent, but non-Quebec Judges $\frac{1}{2}$ or more of majority	148 (.72)	35 (.63)	35 (.71)	16 (.70)	43 (.77)	32 (.78)	10 (.67)	0	319 (.71)
6. 2 Quebec Judges in Assent and more than $\frac{1}{2}$ of majority	6 (.03)	4 (.07)	0	0	0	0	0	1 (.20)	11 (.02)
Totals	206 (1.00)	56 (1.00)	49 (1.00)	23 (1.00)	56 (1.00)	41 (1.00)	15 (1.00)	5 (1.00)	451 (1.00)

Quebec Judges Participation in Quebec Appeals - Period III (1919-1949)

Table 11c

		Type of Law							
	Civil Code	Quebec Statute	Quebec Statute Civil Code	Federal Statute	Federal Criminal Statute	Constitu- tional	Other	Totals	
1.	No Quebec Judges	1 (.01)	0	0	0	0	0	0	1 (.00)
2.	Quebec Judges (1, 2 or 3) Unanimous in Dissent	4 (.03)	0	0 (.05)	0 (.14)	0 (.03)	2 (.40)	0	9 (.04)
3.	Quebec Judges split, non-Quebec Judges Constitute $\frac{1}{2}$ or more of the majority	9 (.06)	0 (.08)	3 (.15)	0 (.18)	0 (.14)	2 (.38)	0 (.20)	88 (.07)
4.	Quebec Judges Unanimous in Assent, but non- Quebec Judges con- stitute $\frac{1}{2}$ or more of majority	22 (.13)	1 (.08)	4 (.20)	2 (.18)	1 (.14)	12 (.38)	2 (.40)	45 (.18)
5.	Quebec Judges split and consti- tute more than $\frac{1}{2}$ of the majority	4 (.03)	1 (.08)	1 (.05)	0 (.03)	0 (.03)	0 (.03)	0 (.03)	7 (.03)
6.	Quebec Judges Un- animous in Assent, & constitute more than $\frac{1}{2}$ the majority	117 (.75)	9 (.75)	11 (.55)	9 (.82)	5 (.71)	15 (.47)	0 (.50)	167 (.68)
	Totals	157 (1.00)	12 (1.00)	20 (1.00)	11 (1.00)	7 (1.00)	32 (1.00)	5 (1.00)	246 (1.00)

Quebec Judges Participation in Quebec Appeals - Period IV (1950-64)

the Quebec judges on each case have all been defeated, we can see that this situation has occurred with about the same frequency in appeals confined to provincial law matters (columns 1 to 3) as it has in those which involve some federal legal concern. On the other hand, the figures in rows 3 and 4 of the pre-1949 tables indicate that the Quebec judges have not shown either more coherence or a greater tendency to participate in Civil Code cases or those involving other facets of Quebec's legal system.

The main point of contrast which these tables reveal is between different periods. Of course, the most marked contrast, is between the three pre-1949 periods together and the post-1949 period. As we have previously noted, simply by virtue of increasing Quebec's representation from two out of seven to three out of nine judges, the potential capacity of the Quebec judges to dominate the Court in Quebec appeals, especially when the Court sat as a five judge court, was greatly expanded. Table 7d when set beside the tables for the three divisions of the earlier period shows how this potential power was converted into real numerical predominance. Prior to the expansion of the Court, there was only one rather rare voting pattern which could make the Quebec members of the Court the largest element in the Court's majority on a Quebec appeal. That was, of course, when with five judges sitting for a case the two Quebec judges were joined in a split decision by one of their common-law colleagues.



This situation occurred only about three times in every 100 appeals. However, after 1949, the preponderance of the Quebec justices on the majority side of the Court became the normal rather than the exceptional situation in Quebec appeals. If in Table 11d we add together the cases in which the Quebec judges split but still retained control of the majority (row 5) with those in which they were unanimous and constituted more than half of the majority (row 6), we can see that this accounts for 71% of all Quebec appeals. Moreover if we confine our attention to appeals involving only Quebec law (columns 1 to 3) we can see that in over three-quarters of these cases the Quebec judges were the predominant element in the majority. We should note that in cases involving constitutional law where nine or seven judges usually sit, the Quebec judges cannot enjoy the same numerical superiority. To a somewhat lesser extent this is also true of criminal cases.

But besides this expected difference between the pre-and post-1949 epochs. There is also a significant difference between periods I (1877-95) and II (1896-1918) on the one hand and period III (1919-1945) on the other. In the latter period the figures suggest that the Quebec judges were more cohesive, more persuasive and more active participants in Quebec appeals than their counterparts had been in the Court's earlier years. A significantly larger proportion of cases during period III found both Quebec judges in the

majority and, on the other side of this coin, we can observe that the proportions of cases in which the Quebec judges were unanimously defeated, (row 2), in which they split their votes (row 3) and in which only one Quebec judge took part on the majority side, (row 4), all diminished.¹ Perhaps the most obvious explanation of this increase in the relative influence of the Quebec members of the Court in Quebec appeals is to be sought in terms of the superior quality of Quebec appointments to the Supreme Court bench during this period. Jurists of the calibre of Rinfret and Mignault were more likely to command the respect of their common-law colleagues on the bench and perhaps they were also more responsible in accepting their duty to contribute to the Court's civil law adjudication than some of the earlier Quebec appointees whose appointments would appear to have depended more on their political connections than on their professional achievements.

It is instructive to relate the divisions within the Supreme Court in Quebec appeals to the Supreme Court's relationship with the Quebec Courts. As might be expected, we find that in those decisions in which Quebec members of the Supreme Court were defeated there was a marked tendency for the highest court of last resort in Quebec to be reversed by the Supreme Court.

¹ These differences are all significant at the 5% level.



Disposition of Appeal by Supreme Court

Participation of Quebec Judges

	Quebec Court Affirmed	Quebec Court Reversed or Varied	Case Decided on Jurisdictional Grounds	Totals
No Quebec Judges on Case	0	1 (.50)	1 (.50)	2 (1.00)
Quebec Judge or Judges Defeated by Non-Quebec Judges	8 (.36)	14 (.64)	0	22 (1.00)
Quebec Judges Split	39 (.44)	49 (.56)	0	88 (1.00)
Quebec Judges all Participate in Majority	405 (.65)	209 (.34)	6 (.01)	620 (1.00)
Totals	452 (.62)	273 (.37)	7 (.01)	732 (1.00)

Role of Quebec Judges in Quebec Appeals Concerning the Civil Code 1877-1964

Table 12

In Table 12 for those appeals dealing mainly with aspects of Quebec's Civil Code we have cross tabulated the role played by Quebec Supreme Court judges with the Court's disposition of the Quebec appeal. Here there is an obvious contrast between the cases in which Quebec judges have dissented and those in which they have been on the majority side of the Supreme Court. The contrast is particularly marked in those 22 cases in which the Quebec members of the Supreme Court were all on the dissenting side. In 64% of these, the Supreme Court altered

the decision reached by the lower Quebec Court, whereas in those cases which found the civilian judges all in the majority only 34% involved reversals or variations of the Quebec Court's decision. In the third row of cases where the Quebec judges split and the non-Quebec judges together with one or two Quebec judges prevailed against the opinion of at least one Quebec judge the rate at which the Supreme Court reversed or varied the Quebec court of last resort declines somewhat. However even here the difference between the rate of reversal in these cases and the frequency of reversals in those cases where all the Quebec judges sitting for the case participated in the majority is still significant at the 1% level.

These differences indicate that more often than not, when in Quebec appeals concerning the Civil Code the Supreme Court has been divided and all or some of its civilian jurists have dissented, the Court's predominantly non-Quebec majority has upset the judgment of the majority of judges on Quebec's highest court of last resort. This tendency might strengthen the suspicions of those who



have joined in the classical Quebec protest against the Supreme Court's review of Quebec civil law decisions. Although it should be noted that we have not traced these appeals back to the Quebec courts to see whether there were divisions among the judges who heard the case in Quebec paralleling the divisions on the Supreme Court. It may be that what we have called the "common law majority" on the Supreme Court in many of these cases have treated a Civil Code issue in the same way as did a Quebec judge at the trial level or a minority of the civilian judges on the Quebec appeal court.¹ While this may be no comfort to the Supreme Court's civilian critic who insists that the opinion of the majority of civilian jurists at the appellate level in Quebec should prevail against that of the "common-law" majority on the Supreme Court, still it might make it more difficult for such critics to assume that the position taken by the non-Quebec judges in these Supreme Court divisions necessarily entails an alien or common-law approach to Quebec's legal system.

One other facet of the Supreme Court's treatment of Quebec appeals which might cast some light on the roles which the Quebec and non-Quebec judges have played in adjudicating

¹ In Taillon v. Donaldson [1953] S.C.R. 257 which is perhaps the most celebrated of modern cases in which three non-Quebec judges prevailed against two Quebec judges on a question appertaining to an Article of the Civil Code, the trial judge in Quebec had decided the case in the same way as the Supreme Court's "common law" majority. See further discussion of this case below at p. .

Quebec legal issues is the distribution of opinion-writing responsibilities among the members of the Supreme Court's bench. When we examine the Supreme Court's decisions to see which judges actually wrote opinions, we may find, for instance, that the numerical inferiority of the Court's Quebec wing which as we have seen was a marked feature of the Court's record in the pre-1949 era, may at least in part be offset by a tendency for the Quebec judges to write the opinion of the Court whenever they were members of the majority.

For our examination of opinion-writing we have first of all divided the Court's reported decisions in Quebec appeal cases into those in which there was only one opinion written for the majority, (the other members of the majority simply concurring with it) and those in which two or more members of the majority wrote substantial opinions of their own. We have further sub-divided the first group of cases into those in which the single opinion of the Court's majority was written by a Quebec judge and those in which the opinion of the Court was written by a non-Quebec judge. Thus we have distinguished three possible opinion-writing arrangements:

- 1) cases in which a Quebec judge wrote the Court's opinion;
- 2) cases in which a non-Quebec judge wrote the Court's opinion;
- 3) cases in which there were several opinions written for the majority side. It should be noted that cases in the third category will certainly include instances in which several

Quebec judges wrote majority judgments.

Table 13 applies these three categories to all Quebec appeals in each of the four periods into which we have divided the Supreme Court's appellate experience. These periods are the same as those used above in Tables 11a to 11d. First, when we look at the overall picture, we can see that the Quebec judges' participation in opinion-writing has been disproportionately large when compared with their numerical involvement in Quebec appeal cases. While the Quebec members of the Court constituted more than half of the Court's majority in less than 3% of Quebec appeals prior to 1949, they were exclusively responsible for writing the judgment of the Court's majority in 37% of the Court's Quebec appeals prior to 1949. Further the incidence of Quebec leadership in opinion-writing has increased over time, rising from 28% in the first period to 41% in the third pre-1949 period. Of course, the large jump to 64% in the modern period would in large measure be a consequence of increasing from two to three the number of Quebec judges available for hearing Quebec appeals.

In Table 14 we have cross-tabulated the three alternative opinion-writing situations with the various legal categories for all of the Supreme Court's reported decisions in Quebec appeals. This cross-tabulation suggests that to some extent the Quebec judges have been more prominent in writing opinions for cases dealing with Quebec

	Period I (1877- 1895)	Period II (1896- 1918)	Period III (1919- 1949)	Period IV (1950- 1964)	Totals
Quebec Judge Wrote Opin- ion of the Court	75 .28)	163 (.38)	187 (.41)	158 (.64)	583 (.42)
Non-Quebec Judge Wrote Opinion of the Court	60 (.22)	89 (.21)	85 (.19)	36 (.15)	270 (.19)
Two or More Opinions Writ- ten for Majority	136 (.50)	172 (.41)	179 (.40)	52 (.21)	539 (.39)
Totals	271 (1.00)	424 (1.00)	451 (1.00)	246 (1.00)	1392 (1.00)

Distribution of Opinion-Writing in Quebec Appeals by Periods

Table 13

legal issues than in those which have raised questions of federal import. If we treat the cases tabulated in columns 1 to 3 as representing cases confined to Quebec legal issues, and columns 4 to 8 as representing those entailing federal concerns, we find that the frequency of cases in which a Quebec judge wrote the Court's opinion is significantly larger in the former group of cases than in the latter. In 45% of the former cases the Court's opinion was written by a Quebec judge, whereas in only 33% of the latter group was this the case. On the other hand the proportion of cases in which non-Quebec members of the Court were responsible for the single opinion of the Court is markedly higher in those three classes of appeals -

	1	2	3	4	5	6	7	8
Civil Quebec Code Statute	Civil Code & Quebec Statute	Civil Code & Quebec Statute	Civil Code & Quebec Statute	Federal Statute & Quebec Law	Federal Criminal Statute	Constitu-tional	Other	Totals
Quebec Judge Wrote Opinion of the Court	351 (.48)	52 (.34)	43 (.43)	34 (.48)	70 (.35)	27 (.30)	4 (.10)	28 (.28) 583 (.42)
Non-Quebec Judge Wrote Opinion of the Court	114 (.16)	29 (.19)	12 (.12)	13 (.18)	58 (.29)	30 (.34)	12 (.30)	28 (.28) 270 (.19)
Two or More Opinions Written for the Majority	267 (.36)	70 (.46)	45 (.45)	24 (.34)	74 (.37)	32 (.36)	24 (.60)	43 (.43) 539 (.39)
Totals	732 (1.00)	151 (1.00)	100 (1.00)	71 (1.00)	202 (1.00)	89 (1.00)	40 (1.00)	7 (1.00) 1392 (1.00)

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Distribution of Opinion-Writing in Quebec Appeals by Legal Category

Table 14

federal statutory law, criminal law and constitutional law - raising legal issues which went beyond purely provincial concerns. The figures in columns 7 are perhaps of some special interest, for while they reveal an abnormally high propensity for the Court's majority to produce a plurality of opinions, it would appear that this is mainly at the expense of single-opinions authored by Quebec judges, the number of non-Quebec single opinions being higher than in most other categories.

This analysis of opinion-writing should, to some extent, moderate the conclusions which might be derived from our earlier examination of the numerical weight of Quebec judges' participation in voting in Quebec appeals. That study clearly demonstrated that prior to 1949 the occasions upon which the civilian members of the bench were quantitatively the dominant element in the Court's majority were very rare indeed. However, this numerical inferiority was at least partially compensated for by the frequency with which Quebec members of the Court, particularly in appeals exclusively concerned with Quebec's distinctive legal system, wrote the opinion of the Court whenever they were part of the Court's majority.

Still this will be no consolation to the civilian critic of the Supreme Court who takes the view that any amount of influence over Quebec's civil law system by jurists who have not been formerly trained in that system is objectionable. Such critics as these will be far less impressed by the fact

that the Quebec minority on the Court have been approximately twice as active as the common-law majority in writing the opinion of the Court in Quebec appeals, than by the fact that, despite this contrast, non-Quebec judges have written the single opinion of the Court in roughly one out of every five Quebec appeal cases. Further, they will note that despite the addition to the Court's bench of a third Quebec judge in 1949, the proportion of cases in which the non-civilian wrote the Court's opinion in Quebec cases was still 15%

When we add to this the evidence of a positive correlation between those occasions upon which Quebec members of the Supreme Court have been defeated by the non-Quebec majority and those upon which the Supreme Court majority has upset the decision of Quebec's highest provincial appeal court, it is impossible to deny the influence which the so-called "common-law" members of the Supreme Court have had on the adjudication of Quebec law-suits, including those which have turned essentially on the interpretation of the Civil Code. The evidence presented here shows that the potential control over the adjudication of Quebec legal controversies bestowed by the Supreme Court's organization on the non-Quebec majority of that Court has on many occasions been converted into actual power and used to defeat the judicial reasoning of both the Quebec members of the Supreme Court and the senior jurists of the Quebec Court of

Queen's Bench.

Finally we should note that the civilian critic of the Supreme Court would not likely be satisfied even if the non-Quebec judges came to play a more passive rôle in Quebec appeals. He would surely see little point in permitting non-Quebec judges to take part in Quebec cases dealing with civil law matters if these judges were simply to be dead weight, rubber-stamping the judgment of two or three civilian judges. In effect this would mean that instead of common law judges being instrumental in reversing the judgments of the senior Quebec courts, a pair of civilian judges (or at most three civilian judges) on the Supreme Court of Canada would be given the power to reverse decisions reached by a larger number of judges on a Quebec court of last resort. In addition to the peculiar arithmetic of this arrangement what is likely to compound its inherent injustice in the eyes of many Quebec civilians is that not many of Quebec's jurists are likely to rate the Supreme Court civilians' grasp of Quebec civil law as superior for instance to that of the members of Quebec's Court of Queen's Bench. Indeed over the years a considerable number of Quebecers — many of them respected lawyers — have made exactly the reverse evaluation.¹

¹ Several of the lawyers who responded to our questionnaire on the use of language in the Court attached memoranda or wrote letters in which they expressed this opinion. Some provided quite detailed analyses of the professional background of the current Quebec judges on the Supreme Court which they compared unfavourably with the background of the majority of judges who belong to Quebec's appellate courts. See above chapter III, section 2, especially pp. 275-6.

Of course, no amount of statistical evidence can demonstrate whether this influence which non-Quebec judges have had on the development of Quebec law or on the rights and interests of Quebec litigants has been a beneficial or detrimental force. As we argued above in Chapter II of this Report, a pragmatic test of the consequences of the common-law influence on the Quebec legal system would require a careful examination of the actual skills of the "common-law" judges in adjudicating civil law issues, as well, of course, as a painstaking inquiry into the actual effects of individual decisions or series of decisions on both the immediate interests of the parties to Supreme Court appeals and the long-run evolution of Quebec's legal culture. If, however, this pragmatic approach is eschewed for a more ideological one based on a belief in the intrinsic merits of judicial nationalism, the evidence presented in this section can be used as grounds for arguing that the judicial organization of this country ought to be changed so that Quebec's distinctive legal system is subject to interpretation solely by those judges nurtured in that system. And, lest this principle of judicial nationalism be too lightly dismissed by those who are not apt to share it in this context, it is worth recalling the extent to which common-law Canadian jurists, especially in the context of constitutional law, invoked a similar principle to transfer judicial control from the Judicial Committee of the Privy Council to the Supreme Court of Canada.



